

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
INDUSTRIAL WELFARE COMMISSION

Public Hearing

March 31, 2000  
State Capitol, Room 4203  
Sacramento, California

P A R T I C I P A N T S

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1                                    P R O C E E D I N G S

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3                                    (Time noted: 10:14 a.m.)

4                    COMMISSIONER DOMBROWSKI: Given the overflow of  
5 the crowd, you should be aware that there are some closed  
6 circuit television opportunities, if you don't wish to stand  
7 in the aisles. There's the sixth floor cafeteria that will  
8 have the telecast on up there, on their TVs. And there's  
9 also, on the third floor, outside of Room -- I believe it's  
10 3030 -- there's the television in the corridor, for some of  
11 you. It's not a very big area there. But if you wish to  
12 take advantage of those opportunities, you can.

13                    I'd like to call the meeting to order, and I'd  
14 like to have a call of the roll.

15                    MR. BARON: Bosco.

16                    COMMISSIONER BOSCO: Here.

17                    MR. BARON: Broad.

18                    COMMISSIONER BROAD: Here.

19                    MR. BARON: Coleman.

20                    COMMISSIONER COLEMAN: Here.

21                    MR. BARON: Dombrowski.

22                    COMMISSIONER DOMBROWSKI: Here.

23                    MR. BARON: And I guess it should be noted for the  
24 record that we at present have a vacancy on the Commission  
25 due to the, I guess, resignation of Chuck Center, the  
26 present -- who had been the chair, I guess, for -- let's say

1 for health reasons.

2 COMMISSIONER DOMBROWSKI: I'd like to make a  
3 motion for the commissioners to recognize Chuck for his  
4 service and wish him well.

5 COMMISSIONER COLEMAN: So moved.

6 COMMISSIONER DOMBROWSKI: All in favor?

7 (Chorus of "ayes")

8 COMMISSIONER DOMBROWSKI: Okay. The first item of  
9 the agenda is the approval of the minutes. Can I have a  
10 motion?

11 COMMISSIONER BOSCO: I move the minutes be  
12 approved.

13 COMMISSIONER DOMBROWSKI: Second?

14 COMMISSIONER COLEMAN: Second.

15 COMMISSIONER DOMBROWSKI: All in favor?

16 (Chorus of "ayes")

17 COMMISSIONER DOMBROWSKI: A housekeeping item, for  
18 the audience: Agenda Item Number 5, "Consideration and  
19 public comment on the issue of whether employees who receive  
20 a certain base wage that is higher than the current minimum  
21 wage, as well as additional compensation, should be exempt  
22 from overtime pay requirements," is being removed from the  
23 agenda.

24 (Applause and cheering)

25 COMMISSIONER DOMBROWSKI: Do I hear a motion to  
26 adjourn?

1 (Laughter)

2 COMMISSIONER DOMBROWSKI: Okay. The second item  
3 on the agenda is consideration of and public comment on the  
4 amendment to replace language in Section 5(M) of the Interim  
5 Wage Order, regarding stable employees.

6 COMMISSIONER BROAD: Mr. Chairman, we have  
7 received communication from the Department of Labor  
8 regarding coverage of the Fair Labor Standards Act for these  
9 employees, that they may be covered for overtime after 40  
10 hours in a week. The proposal before us today would  
11 continue a provision of state law that requires overtime to  
12 be paid after 56 hours in a week. And as a result of that  
13 conflict, I think it would be prudent at this point to  
14 remove this matter from the agenda and to consider it  
15 perhaps, if necessary, at a later date.

16 AUDIENCE MEMBER: We'll be back!

17 (Laughter)

18 COMMISSIONER DOMBROWSKI: Does he represent the  
19 stable employees?

20 COMMISSIONER BROAD: No. He's just having a good  
21 time.

22 AUDIENCE MEMBER: (Not using microphone) No, I  
23 represent working people. We'll be back.

24 COMMISSIONER DOMBROWSKI: I would ask that we do  
25 not have comments shouted from the audience, that we would  
26 take testimony appropriate.



1 Is that a motion, Barry?

2 COMMISSIONER BROAD: Yes.

3 COMMISSIONER DOMBROWSKI: Do I have a second?

4 COMMISSIONER COLEMAN: Second.

5 COMMISSIONER DOMBROWSKI: All in favor?

6 (Chorus of "ayes")

7 (Applause)

8 COMMISSIONER DOMBROWSKI: All right. Item Number  
9 3, consideration of and public comment on the amendment to  
10 Section 1 of Interim Wage Order 2000 to include a revised  
11 definition of an "outside salesperson."

12 COMMISSIONER BROAD: Mr. Chairman?

13 COMMISSIONER DOMBROWSKI: Commissioner Broad.

14 COMMISSIONER BROAD: Perhaps to shorten this  
15 matter, I'm inclined to make a motion that this  
16 investigation be closed on this matter, which would, of  
17 course, result in the existing IWC provision regarding  
18 outside salespersons to remain as it is. And perhaps you  
19 could inquire, in the audience, that in light of that, if  
20 there's anyone who would still wish to testify on this  
21 matter.

22 COMMISSIONER DOMBROWSKI: Yeah. I would like to  
23 at least have those people interested in this issue come  
24 forward and give us their opinion on that.

25 MS. BROYLES: Good morning, commissioners.

26 Julianne Broyles, from the California Chamber of Commerce.

1 In a rare moment of accord, Barry -- Commissioner Broad and  
2 I find ourselves in agreement. The California Chamber does  
3 believe that the outside salesperson exemption, as it  
4 currently exists in IWC and in different case law, is the  
5 appropriate way to leave it at the moment, particularly in  
6 light of the recent decision, U.S. -- or, pardon me --  
7 California Supreme Court decision in *Ramirez v. Yosemite*  
8 *Water*. We think adding any additional definitional changes  
9 at this time would just muddy the water, so to speak, and  
10 make it more difficult for employers to legally comply.

11 So, for those reasons, we certainly would approve  
12 of removing this from the agenda today.

13 MR. ACHERMAN: Mr. Chairman, members. Bob  
14 Acherman, representing the California and Nevada Soft Drink  
15 Association. At the risk of breaking a string of standing  
16 ovations, we are willing to acquiesce in the continuation of  
17 the current exemption. There were issues with the proposed  
18 amendments, and I think we're willing to stick with existing  
19 law.

20 MR. WETCH: Scott Wetch, with the State Building  
21 and Construction Trades Council. And for the first time in  
22 my memory, I'd like to concur with the Chamber of Commerce  
23 on their motion to remove that.

24 (Laughter and applause)

25 COMMISSIONER DOMBROWSKI: We're on a roll today!

26 MR. WETCH: Our concern with the proposed

1 language, the redefinition of outside salesperson, is that  
2 it could easily be construed to be applied to workers in the  
3 construction service and repair industry, such as the  
4 plumbing, refrigeration, and electrical repair industries.  
5 In the construction service and repair industry, one  
6 function of a service repair person is to go on calls and  
7 provide estimates before obtaining an order or a contract  
8 for work to be performed. In most instances, the repair  
9 work is then performed at the time the estimate is provided.  
10 Despite the fact that the primary function of the repair  
11 person is to provide the plumbing, electrical, or  
12 refrigeration repair work, under the proposed definition,  
13 they could easily be declared by their employer as an  
14 outside salesperson, merely by paying them on a commission  
15 basis.

16 We believe that this would not only deprive these  
17 tradespeople of their legitimate right to overtime pay, but  
18 it would have the unintended and the unfortunate consequence  
19 of making every service repair person a commissioned  
20 employee, which would only serve to hurt consumers. And for  
21 those reasons, we would urge you to reject the proposed  
22 amendment.

23 MS. GATES: My name is Patricia Gates, and I'm an  
24 attorney with the Van Bourg Law Office.

25 And I originally proposed the definition to be  
26 expanded to include a definition of delivery. The response

1 from the industry has been to offer language which would  
2 muddy the waters. And for that reason, I am willing to  
3 accept the current definition because we have a favorable  
4 interpretation from the California Supreme Court.

5 I would urge the Commission, when final orders are  
6 published, however, to make reference to appropriate law,  
7 because I think, for all of the people trying to follow the  
8 law, when there is a landmark case that has been decided  
9 that interprets a definition of the Industrial Welfare  
10 Commission, I think it assists people in complying with the  
11 law.

12 And my interest in being here is that our office,  
13 right now, currently represents 1,000 workers in an unfair  
14 competition action against their employers because the  
15 employers are giving them lofty titles but no overtime. And  
16 this is against the law. These employers are violating the  
17 law. And I think anything that this Commission can do to  
18 clarify the law and make the law enforced is a positive  
19 thing.

20 I would support leaving the definition as is now.  
21 I would ask you to consider a reference to the *Ramirez*  
22 decision in final orders that are issued later in 2000 or  
23 2001.

24 MR. RANKIN: Tom Rankin, California Labor  
25 Federation.

26 As one of the interested parties in this issue, we

1 concur with Commissioner Broad's suggestion that things be  
2 left as they are, given the Supreme Court decision.

3 COMMISSIONER DOMBROWSKI: Thank you.

4 Do we need a motion?

5 COMMISSIONER BROAD: Yeah. I'd like to move that  
6 we close the investigation on the matter of outside  
7 salespersons.

8 Oh, I'm sorry.

9 COMMISSIONER DOMBROWSKI: I'm sorry.

10 MR. TOLLEN: Yeah. I'm sorry. I'd like to be  
11 heard too.

12 I'm Bob Tollen, with Seyfarth, Shaw, Fairweather &  
13 Geraldson.

14 Obviously, this issue has -- this question of the  
15 outside sales exemption has become embroiled in all kinds of  
16 tinkering with the language that effects the *Ramirez*  
17 decision. And it sounds like the commissioners would like  
18 to get it off the table and be done with it.

19 But we proposed a change to the language that has  
20 nothing to do with any of the -- of that kind of tinkering.  
21 It has nothing to do with trying to expand or contract the  
22 kinds of activities that delivery men and shelf-stockers and  
23 what-have-you engage in. We have proposed language that is  
24 related solely to the activities of a legitimate outside  
25 salesperson.

26 Our concern is that, given the Supreme Court's

1 conclusion that we have a strictly quantitative approach  
2 under the law, and that's the law, it does not make sense to  
3 say that when a legitimate outside salesperson goes back to  
4 his office to write up his orders, or to make a telephone  
5 call to an outside sales prospect to say, "I want to come  
6 and sell to you," it does not make sense that that time back  
7 in the office cannot count as part of the outside sales  
8 activities and be included within the 50 percent. If that  
9 salesperson were to go home and do the same thing, it would  
10 count. If he were to sit in his car and do the same thing,  
11 it would count. And all we've asked is to say that if he  
12 merely goes back to his office and does the same thing, it  
13 would count within the 50 percent.

14           It is the language which we've submitted to you  
15 that says that, regardless of location, if he "engages in  
16 activities closely related," but even more strongly, "and  
17 supporting his or her outside selling activities," such as  
18 writing up orders, writing sales reports, revising the  
19 salesperson's catalog, contacting prospective customers to  
20 arrange meetings away from the employer's place of business,  
21 planning itineraries, attending sales meetings, and so  
22 forth, this is all legitimate activity of a legitimate  
23 outside salesperson and ought to be included within that  
24 activity.

25           COMMISSIONER DOMBROWSKI: Mr. Rankin?

26           MR. RANKIN: Yeah. I'm sorry that the proponents

1 of that position aren't interested in the status quo  
2 compromise.

3 But what that position does, basically, is it  
4 expands the ability of management to misclassify more people  
5 as outside salespersons and thereby deprive them of  
6 overtime. And as you heard before, we're strongly opposed  
7 to that proposal.

8 COMMISSIONER DOMBROWSKI: Any other comments?

9 MS. GATES: Just in rebuttal, I would say that  
10 location is a critical part of this definition. And if work  
11 that is done inside is to be considered exempt under  
12 outside, it would change the standard critically. And my  
13 written testimony addresses that, and I would refer the  
14 commissioners to that.

15 But I would urge, again, that the status quo  
16 remain and that no amendments be accepted at this time.

17 COMMISSIONER DOMBROWSKI: Any other comments from  
18 the audience?

19 MR. McKUNE: Yes, please.

20 Good morning. Ron McKune.

21 COMMISSIONER DOMBROWSKI: Is your microphone on  
22 there?

23 MR. McKUNE: Thanks.

24 Good morning. Ron McKune, from The Employers  
25 Group.

26 We feel that compromise is possible and we accept

1 the *Ramirez v. Yosemite Water* decision. We feel that  
2 inclusion of that language would be appropriate. We also  
3 feel that the language which Mr. Tollen has introduced would  
4 be of value and that all -- and that both language which  
5 talks about what is not sales activity, as well as language  
6 which talks about what is outside sales activity, would help  
7 give complete guidance to the public.

8 Thank you very much.

9 COMMISSIONER DOMBROWSKI: Thank you.

10 Any other comments?

11 (No response)

12 COMMISSIONER DOMBROWSKI: Okay. Do I hear a  
13 motion?

14 COMMISSIONER BROAD: Well, there's a motion. I  
15 made a motion, so --

16 COMMISSIONER DOMBROWSKI: Oh, I'm sorry. Do I  
17 have a second?

18 COMMISSIONER COLEMAN: Second.

19 COMMISSIONER DOMBROWSKI: All in favor of closing  
20 out the investigation, say "aye."

21 (Chorus of "ayes")

22 COMMISSIONER BOSCO: Mr. Chairman, I have a  
23 motion. And obviously, from the way we began this meeting,  
24 it's kind of a sad motion to have to make, since all of us  
25 have the greatest respect and admiration for Chuck Center.  
26 I personally have known him for many, many years. And we



1 all wish him well and are sorry that he isn't here as  
2 chairman of our commission.

3 But having said that, since you have managed to  
4 dispose of several controversial items without the slightest  
5 bit of problem this morning, I'm going to move that you be -  
6 - you, Bill Dombrowski, be made permanent chairman of the  
7 Commission.

8 COMMISSIONER BROAD: And I'd like to second that  
9 motion.

10 COMMISSIONER DOMBROWSKI: I think I want to call a  
11 roll call vote.

12 (Laughter)

13 COMMISSIONER BOSCO: You did draw the short straw,  
14 didn't you?

15 COMMISSIONER DOMBROWSKI: I must have left the  
16 room.

17 All in favor, say "aye."

18 (Chorus of "ayes")

19 COMMISSIONER DOMBROWSKI: All opposed?

20 (No response)

21 COMMISSIONER DOMBROWSKI: Okay. Thanks.

22 Item Number 4, pursuant to Labor Code Section  
23 515(a), consideration of and public comment on amendment to  
24 Section 3 of the Interim Wage Order regarding the duties  
25 that meet the test of the exemption for executive,  
26 administrative, and professional employees. Language has

1    been distributed.

2                   We have agendaed this item to have one hour of  
3   comment. We are going to start it off with comments from  
4   Mr. Bill Reich, who's the staff counsel for the Division of  
5   Labor Standards Enforcement, Ventura Office, to give us an  
6   overview of how the Department enforces this policy. We are  
7   then going to have the proponents come up and discuss what  
8   they are trying to do and what the problem is from their  
9   viewpoint. We will then have the opponents come up and talk  
10  for approximately thirty minutes or whatever time is needed  
11  to discuss theirs. And then we will have a kind of general  
12  discussion at the end where we can discuss some of the  
13  issues that have been thrown on the table.

14                  I would say that there is not going to be a vote  
15  on this item today. We are simply taking information.

16                  So, with that, Mr. Reich, would you proceed?

17                  MR. REICH: Yes. Good morning, commissioners.  
18  I'm here to basically discuss the practice that has been  
19  followed by the Division of Labor Standards Enforcement in  
20  enforcing this particular exemption, the executive  
21  exemption.

22                  We've had an extensive development of the law in  
23  this area, and it's -- the focus of our protection has been  
24  based on an acceptance over the years of the federal  
25  standard, of defining the various duties that qualify --

26                  AUDIENCE MEMBER: (Not using microphone) Could

1     you move the mike closer?

2                 MR. REICH:   Is this better?

3                 AUDIENCE MEMBER:   Yeah.

4                 MR. REICH:   Okay.   Sorry.

5                 Our focus has been to adopt the federal standard  
6     that defines the components of what constitutes executive as  
7     the floor upon which the greater protections of California  
8     law have been based.   And historically, the Commission has  
9     indicated its preference for -- or, actually, its acceptance  
10    of our focus on "primarily engaged" as the definitive  
11    standard providing greater protection to California workers  
12    than the "primary duties" standard which has become the core  
13    protection under federal law.   And in the "Statement of  
14    Basis," the prior Commission has emphasized the recognition  
15    that the emphasis on "primarily engaged" is the standard  
16    which provides the greatest protection to California  
17    workers, and that the "primary duties" standard provides  
18    less protection and also presents problems of enforcement.

19                Now, of course, the AB 60 provisions have codified  
20    "primarily engaged."   So, I guess, to spell out what the  
21    Division has done over the years has been focusing on  
22    ensuring that the protections, the greater protections  
23    provided workers, do not furnish employers with an  
24    opportunity to classify or misclassify workers in a way  
25    which diminishes the protections which the IWC historically  
26    intended to apply in this area.

1           So, with this in mind, the criteria that has been  
2 followed is to, in particular, emphasize that "primarily  
3 engaged" is the standard that defines what the executive  
4 must do in order to be exempt. And that means to be  
5 primarily engaged in -- from our point of view,  
6 historically, it's been to be primarily engaged in the  
7 management of the enterprise. And to the extent that that  
8 means spending more than 50 percent of their time performing  
9 the managerial duties, that has been a way of acting as a  
10 buffer against attempts of employers to attempt to treat  
11 employees who actually have a primary duty of management as  
12 exempt when, in fact, they're primarily engaged in work  
13 that's non-exempt.

14           And this is a constant tension here in the  
15 enforcement area, and many of the cases that we end up  
16 litigating involve attempts to say that the duties are, in  
17 fact, what these individuals are doing, and when, in fact,  
18 that it's really their duty that is maybe primarily -- they  
19 may have a primary duty of management, but their actual time  
20 is primarily spent in non-exempt work. And to the extent  
21 that that's an issue that is being -- going to be focused on  
22 that the commissioners need to deal with in terms of this  
23 new language, this is the background problem of enforcement  
24 that the Commission may want to take into account, realizing  
25 that the choice of what -- of, obviously, the choice of the  
26 proper way to implement these protections is for the

1 Commission to make, but simply understanding that if we --  
2 to the extent that the issue is blurred or clouded, we will  
3 be confronting additional enforcement problems where  
4 employers may again view particular provisions of language  
5 as an opportunity to misclassify or improperly classify  
6 workers who the Commission does not intend to be exempt as  
7 exempt, and forcing additional litigation, additional  
8 disputes, and possibly lawsuits filed to clarify the scope  
9 of the protections.

10               So, these are matters that, obviously, the  
11 Commission wants to be aware of.

12               Basically, there are a couple of elements that --  
13 the commissioners are aware, I'm sure, that there are a  
14 couple of elements in the executive exemption which are  
15 prerequisites under federal law and under -- we always  
16 follow this under state law -- one is the element of  
17 supervising at least two employees, and the other one being  
18 the exercise or current exercise of discretionary powers.

19               With regard to the specific itemized duties that  
20 are part of what constitutes an exempt employee, many of  
21 those listed in the proposed language coincide with the  
22 standards that we've followed in the past. What we -- what  
23 we've also included in our manual have been provisions  
24 identifying the types of activities that constitute non-  
25 exempt work. And again, those are -- provide an opportunity  
26 for those who are reading the exemption to understand the

1 two different types of duties. And so, that's something the  
2 commissioners may want to be aware of, that we -- that  
3 that's in front of the workers. And to the extent that we  
4 are -- and the employers as well. And to the extent that  
5 the language classifies duties as managerial, it may want to  
6 specify some of the duties that are non-managerial as well.  
7 From the standpoint of enforcement, that would assist us, if  
8 that -- if that comes up.

9           In addition, again, the critical and difficult  
10 area is -- there are two different types of situations that  
11 I think also may need to be some clarification. In some  
12 situations, the executive versus non-executive situation is  
13 a manager who has two distinct functions that are -- excuse  
14 me -- an employee who has two distinct functions. At times,  
15 he's specifically performing management functions; at other  
16 times, specifically performing non-management functions.  
17 Those are the simple cases of counting the ledger on one  
18 side and counting the ledger on the other side. And we just  
19 look at the hours, and if you spend more than 50 percent of  
20 the time doing the non-exempt work, you're out, you're not  
21 exempt. If you spend more than 50 -- if you spend less than  
22 50 percent and you spend more than 50 percent performing the  
23 management duties, you're exempt.

24           The tough area, the difficult area, the  
25 enforcement problem area, the tension area, is where you've  
26 got individuals who perform both types of functions and

1 those types of functions overlap. They're not fragmentized,  
2 they're not bifurcated. And that's the tension area, and  
3 that's the area that one might want to be concerned about,  
4 from our point of view, the enforcement, when we have to  
5 draw those lines between "primary duty" and "primarily  
6 engaged."

7           Experientially, under our policies as set forth in  
8 our manual, we have succeeded to date in drawing a fairly  
9 clear line as to what is exempt and what's not exempt. And  
10 that's set forth in our manual. And we have excluded --  
11 under our practice, working managers have not been  
12 considered exempt employees, working foremen have not been  
13 considered exempt employees, because they spend their  
14 primary -- primarily spend their time performing the same  
15 functions as those who are their subordinates.

16           Equally, we have not adopted the sole exempt --  
17 the sole establishment exemption in the past because we have  
18 -- that has not been part of California's exceptions,  
19 because, under "primarily engaged," a person could be in  
20 sole charge and still be spending the bulk of their time  
21 performing non-exempt duties.

22           So, again, those are things to consider in terms  
23 of as the Commission evaluates a change or clarification  
24 here, that we're going to be facing possible challenges to  
25 the scope of who is to be exempt or is not exempt. And I'd  
26 like to just have the Commission be aware that this is what

1 we've found in the past, and these are potential issues that  
2 the Commission might want to address in the future.

3 If there are no other questions from the  
4 commissioners, I think that sort of covers the background  
5 that we've followed in the past.

6 COMMISSIONER DOMBROWSKI: Questions?

7 COMMISSIONER BROAD: I have some questions.

8 Do you run across cases where you have a defense  
9 on the part of the employer that -- and let me give you an  
10 example. Let's say you have someone who is designated a  
11 manager at a fast-food restaurant, and the employer says,  
12 "Well, you know, while the person was flipping hamburgers,  
13 they were thinking about managerial things," like, let's  
14 say, a real bona fide managerial thing, like hiring and  
15 firing someone. Does that sort of issue come up?

16 MR. REICH: Yes. This sort of issue comes up  
17 frequently. And under our current enforcement policy, under  
18 the Commission's existing language, that has been -- that  
19 has been an area where we have taken the position  
20 consistently that if the person is actually performing non-  
21 managerial work, the fact that they may have occasional  
22 responsibilities as a manager of the particular  
23 establishment, that that goes to their "primary duty," but  
24 not to what they're "primarily engaged" in doing. They're  
25 primarily engaged in doing the same work as their  
26 subordinates, so therefore they are exempt (sic). So, that



1 goes to the working manager or working foreman.

2 But there is that constant attempt to focus on  
3 mental process, and that mental process has been  
4 consistently viewed as not taking away from the fact that  
5 the individual is actually engaged in non-exempt work. And  
6 that's where that person's energy is being put.

7 And we have -- that goes to the distinction,  
8 again, between "primary duty" and "primarily engaged." The  
9 person might have the duty to manage, and maybe monitoring  
10 in the context of managing, under the "primary duties"  
11 standard, but, in fact, in terms of the activity that  
12 they're engaged in, they're "primarily engaged" in non-  
13 exempt work, from our -- that's under the current approach  
14 that we follow.

15 COMMISSIONER BROAD: So, I take it there's  
16 difficulty measuring or gauging what is a mental function  
17 while you're doing something else. I mean, how -- I guess  
18 that's my question. If someone is sitting there thinking, I  
19 mean, we all think all day long, and someone is thinking a  
20 managerial thought, I take it they don't think that  
21 managerial thought for, say, four hours straight, right?  
22 They --

23 MR. REICH: Right.

24 COMMISSIONER BROAD: They think other thoughts,  
25 like, "I'm hungry," "My feet hurt," "I want to go home,"  
26 whatever they're thinking. So, how is it that those -- how

1 would you, from an enforcement point of view, were we to  
2 adopt a rule that allowed us to say that if you're flipping  
3 burgers and thinking about management, how would we measure  
4 what people's thoughts were, how much time they took?

5 MR. REICH: Well, you've identified, certainly,  
6 what would be a tremendously onerous enforcement problem,  
7 trying to -- trying to -- trying to actually pin down what  
8 portions of mental process should be treated as time spent  
9 performing an executive function and what portions of that  
10 time should be treated as physical or routine functioning,  
11 or mental functioning related to routine functioning, or  
12 mental time having absolutely nothing to do with either one,  
13 would be a very esoteric challenge for us in an enforcement  
14 context.

15 COMMISSIONER BROAD: Thank you.

16 COMMISSIONER BOSCO: In your enforcement work, do  
17 you find that in these kind of close call areas that the  
18 wage differential between a manager, whether that's just a  
19 so-called manager, a burger-flipper manager or whatever, is  
20 in general significant?

21 MR. REICH: In general, I would say that the  
22 individuals who are involved in this sort of  
23 misclassification, under our prior -- under the current  
24 enforcement situation, are generally paid a higher wage than  
25 the persons over whom they are supervising, or their  
26 subordinates.

1           When you say "significant," it varies. In some  
2 cases, there could be a significant difference. In others,  
3 there's not much of a significant difference. It varies.

4           COMMISSIONER BOSCO: Do you ever try to quantify,  
5 if that person were paid overtime such as everyone else  
6 would have to be, if their differential in wage would be  
7 greater or lesser than what their overtime would be?

8           MR. REICH: Well, we don't do that because it's  
9 not our -- it's not an issue for us, it's not a criteria of  
10 making the differentiation. But we do find employers doing  
11 that and pointing that out. And occasionally we do look at  
12 that, in terms of our preparation of a case. And I would  
13 say that -- I would say it's probably about 50 percent of  
14 the time that they would make considerably more than -- they  
15 make considerably more in their salary -- or, not  
16 necessarily considerably, but make more -- sometimes  
17 considerably more -- in their salary than they would even if  
18 they were paid overtime at a lower rate. And then, about 50  
19 percent of the time, if they were paid at an overtime, they  
20 would be making more than their salary. So, it varies. It  
21 depends also on how much they work, how many hours they're  
22 being worked, and so forth.

23           COMMISSIONER BOSCO: So, in this gray area, there  
24 really are no -- there is no language or any experiential  
25 criteria that could definitively guide us in writing all  
26 this out into a regulation.

1           MR. REICH: But focusing on the issue that you  
2 raise, one point to be made on that is that the -- while it  
3 is -- it would be very difficult to write anything that  
4 would address that point, it is also important to note that  
5 the -- once you accept the flat salary, one of the problems  
6 with a flat salary when you accept the exemption, is that it  
7 places no limit on the number of hours that can be worked.  
8 And in contrast, where you apply the non-exempt status, it  
9 implies the policy that there has to be some sort of  
10 incremental payment when you work the person overtime.

11           So that -- so that, when you allow the -- expand  
12 the salary -- the persons who can come under a flat salary  
13 exemption, you expand the possibilities for persons not to  
14 be paid, regardless of how many hours they're required to  
15 work. And that's -- that's what the heart of the exemption  
16 is, from our enforcement perspective.

17           COMMISSIONER BOSCO: Thank you.

18           COMMISSIONER DOMBROWSKI: Any other questions?

19           (No response)

20           COMMISSIONER DOMBROWSKI: I'd like to call up --

21           MR. REICH: Thank you very much, commissioners.

22           COMMISSIONER DOMBROWSKI: Thank you.

23           I'd like to call up Mr. Bruce Young and Mr. Bruce  
24 Laidlaw.

25           Before you begin -- Juli Broyles, why don't you  
26 come up and take a seat? I think there are some other

1 parties who wanted to testify in support. If they could  
2 come up to the table, we'll fill the seats. At least it  
3 will save a little time that way.

4 MR. YOUNG: Mr. Chairman and members -- is your  
5 name pronounced "Dombrowski" or "Dumbrowski"?

6 (Laughter)

7 MR. YOUNG: All right. I just -- I'll work on  
8 that. Sorry. I was thinking "Bosco" or "Broad," I can  
9 pronounce those -- oh, well, I'll try anyway.

10 Bruce Young, on behalf of the California Retailers  
11 Association.

12 And I'd like to begin to speak -- a little  
13 background about how we got to where we are today. I mean,  
14 it really started with shortly after Governor Davis took  
15 office and AB 60 was introduced, along with several other  
16 pieces of legislation by organized labor, which  
17 traditionally, frankly, for the last sixteen years, we've  
18 all been in our trenches. I mean, the employer community  
19 has been on one side, labor has been on the other, and  
20 there's been no harmony or dialogue. This governor asked  
21 the employers in the state, and certainly the retailers who  
22 were supportive of this governor and administration took it  
23 to heart, about that we needed to, I mean, get out of the  
24 trenches and try to work cooperatively. So, we worked  
25 cooperatively on several bills with organized labor,  
26 including one, SB 651, where we are one of the few states

1 that now requires overtime be paid for retail pharmacists,  
2 that one that's, again, for our -- for retail employers, a  
3 significant economic impact to it. But we felt it was the  
4 right approach to doing -- to working with -- in a  
5 cooperative fashion, to try to strike some accord.

6 We did the same thing with AB 60 and literally  
7 broke ranks with the employers because we felt that what the  
8 governor was trying to achieve was worthwhile and worthy to  
9 put into statute. At the same time, the language that's  
10 before you now is not -- I think, for anyone to argue that  
11 it was not the intent of AB 60, that it was not the  
12 direction, or it was put in there by anything other than a  
13 cooperative dialogue between -- that was ultimately --  
14 ultimately concluded with the representative of organized  
15 labor and the employer community in one of -- a legislative  
16 office, I think, begs the truth and the background about  
17 what we tried to do.

18 One of the things that we've struggled with as  
19 employers in California is the definition of managerial  
20 duties, not in any way arguing with the federal standards,  
21 because we believe that should be the threshold. We've long  
22 argued that. Our difficulty is, in the retail setting  
23 especially, is that the manager in a retail setting has to  
24 respond to the public. And when he or she grabs a register  
25 in a frantic pace because there are seven people lined up at  
26 a checkstand and all of a sudden starts checking people, I

1 think it's too -- that person does not become any less the  
2 manager of that store because he or she is, again, trying to  
3 respond to the public and trying to provide a service so  
4 those people come back.

5           And I think, for -- I frankly think it dismisses  
6 what their duties and responsibilities -- to simply say that  
7 we are arguing that people are thinking about being a  
8 manager, that's not the case. The literal point is, when  
9 that's person's running the register, people are coming up  
10 to them and saying, "I've got a problem on Aisle 3," "You've  
11 got to open the safe." They've got many duties they're  
12 doing. They're not simply idly thinking about who they  
13 should hire and fire. They're actively managing that store,  
14 dealing with a crisis with the public.

15           Now, with that said, I think that we're -- and I  
16 should -- let me just finish that thought, which would be  
17 novel to begin with. But -- and that's what we're trying to  
18 deal with, is the concurrent -- that head and hands, that  
19 concurrent activity that -- and I think the Legislature, the  
20 state senator gave the best example when he -- he said when  
21 he worked at the United Parcel Service, that when -- during  
22 the holiday season, the chairman of the board of UPS came  
23 down and worked the assembly line or the sorting line with  
24 the employees. And as the senator said, that person wasn't  
25 any less the chairman of UPS than when he was on the line or  
26 when he was up in his corporate office. The bottom line is

1 we agreed. And for the first time codified the 50 percent.  
2 We codified the duties, and we codified the two and a half  
3 times -- which was a substantial increase -- the two and a  
4 half times minimum wage.

5 But at the same time, we asked, and it was  
6 inserted in there, an obligation or a request of this  
7 Commission that there be some recognition of the concurrent  
8 activities -- not thinking, but the concurrent activities  
9 that a person, when they -- does not surrender their role,  
10 responsibility, or duties of a manager when they have to  
11 perform some of these tasks. And we felt that that language  
12 needed to be defined by this Commission.

13 Now, that said, the language before you -- and we  
14 would urge the Commission, again, not to take action today  
15 -- is not -- is probably not as artfully drawn as it should  
16 be. We would ask that we could work with representatives of  
17 organized labor and other opponents of it to try to come up  
18 with some narrow language to accomplish our goals and, we  
19 think, the goals of AB 60, to allow, again, for the  
20 recognition of that concurrent activities, and the person  
21 isn't -- does not become any less of a manager.

22 I know one of the things that my good friend, Tim  
23 Crimmons, said, that this would in some way jeopardize the  
24 relationship in the construction industry of the journeymen  
25 and their relationship, all of a sudden they could be  
26 recategorized as managers, that's not our intent. And if it



1 needs to have specific language to do that, we'll be glad to  
2 work with Tim and other representatives of the building  
3 trades to clarify that.

4 But at the same time, we think there's a special  
5 recognition, especially for the service industry, to be able  
6 to have that ability to recognize the responsibilities and  
7 duties continue when that person does what it takes to keep  
8 a service -- a business going.

9 With that said, I will yield to Mr. Bruce Laidlaw  
10 who can perhaps talk more specifically about our proposal.

11 MR. LAIDLAW: My name is Bruce Laidlaw. I'm here  
12 -- I'm with the law firm of Landels, Ripley, and Diamond, in  
13 San Francisco, here on behalf of the retailers in support of  
14 the IWC proposal.

15 I think I'm going to focus mainly on certain  
16 objections that I have heard and provide a little commentary  
17 on them.

18 One of the primary arguments seems to be that the  
19 floodgates are going to be opened because the language is  
20 ambiguous, and that people, wide ranges of people, who never  
21 before would have been viewed as managers and not entitled  
22 to overtime will suddenly be put into the managerial  
23 category. And I think that it's -- the problem is, by  
24 focusing just on the duty element and forgetting that there  
25 are several other aspects of the test for an executive  
26 employee, perhaps the one that'll keep the floodgates closed

1 the most is simply the fact that these employees have to be  
2 paid twice the state minimum wage. So, right there, I think  
3 there's a lot of people who aren't going to pass that test.

4 And working your way down, the exercise of  
5 discretion and independent judgment is still in the wage  
6 orders. That's not being tossed out. It's my understanding  
7 that there's no effort to eliminate the requirement that  
8 someone who's categorized as exempt has to be supervising  
9 two people, or the equivalent of two people, and that that  
10 individual has to have hiring and firing authority. And  
11 then, you also have the quantitative test of taking out your  
12 ledger and finding out whether they're devoting 50 percent  
13 of their time to managerial duties, as defined in the  
14 proposed regulations.

15 So, I think that anybody who proposes some sort of  
16 hypothetical employee who's suddenly going to find  
17 themselves a manager should be asked to run through all of  
18 these elements of the test and not focus on the duties,  
19 because, otherwise, you get sort of a misleading impression  
20 of what's trying to be accomplished here.

21 Opponents also argue that this is an attempt to  
22 sort of junk the quantitative test of California law in  
23 favor of the more lenient, if you will, "primary duty" test  
24 of federal law. And I think that's clearly not the intent.  
25 You still have to get out the ledger. You still have to  
26 look and see what these employees are doing. You decide

1 whether that is an exempt duty or a non-exempt duty. You  
2 total up the time, and you see where you come out. There is  
3 nothing in the language that suggests that that counting up  
4 is disappearing. It appears to me that all that has been  
5 done is -- and this is exactly what the Legislature asked be  
6 done -- is to define what duties go on the exempt side of  
7 the ledger. That's what the IWC was asked to do, and I  
8 think that's what the current language does. It defines the  
9 duties that go on the exempt side of the ledger. But it  
10 doesn't eliminate the counting.

11           There is obviously considerable attention being  
12 focused on the heads and hands aspect of this, that is, to  
13 the time where somebody who is in a managerial position is  
14 both doing some sort of managerial work, be it directing an  
15 employee to clean up something that's fallen on the floor or  
16 whatever, and doing some sort of work that is -- would be  
17 deemed non-exempt, some sort of production work. And I  
18 think that this is reality. As Mr. Young says, this happens  
19 all the time. The case law in this area recognizes that  
20 this is reality, that this happens all the time. And  
21 really, the question is simply which -- when that is  
22 happening, how is that going to be characterized for  
23 purposes of applying the exemption? Is it going to be  
24 characterized as exempt time or non-exempt time in this  
25 simultaneous situation?

26           It appears to me that the IWC has simply made the

1 judgment that when you're talking about the kind of employee  
2 who has a wide range of managerial duties, is supervising  
3 employees and the other things I mentioned as part of the  
4 test, and who has this higher level of compensation, because  
5 they're supposed to be thinking, because this is their job,  
6 is to use their head, that in the event that one of those  
7 employees is both using their head and their hands, that  
8 it's consistent -- I think it's fair and reasonable, and  
9 it's consistent with the legitimate expectations of  
10 employers, that that time be put on the managerial side of  
11 the ledger. That is what -- as I understand it, what the  
12 IWC proposal does.

13 Now, I think it's important to recognize that  
14 there's going to be times when some -- the manager is not  
15 using his head, if you will, where the work is going to be  
16 strictly non-exempt. This is not an effort to create some  
17 sort of situation or belief that because somebody's a  
18 manager, they'll automatically be spending all their time  
19 thinking about management and so there will never be any  
20 inquiry into -- any need for an inquiry.

21 And I think that gets to the point of how do you  
22 enforce this. Well, this is -- this is not going to make  
23 the enforcement any more difficult. I do -- I've been  
24 involved in these kinds of cases, I do this kind of stuff,  
25 and I can tell you that current California law is very  
26 complicated. It's a big pain. What you need to do is to

1 sit down, if it's a litigated context, you take the  
2 deposition of the person who's saying they're misclassified,  
3 and you run them through their entire day and you find out  
4 what they were doing during their entire day, for an entire  
5 week. You know, you've got your ledger, you've got your  
6 minutes devoted to this kind of work, and you come up with  
7 an answer. That is exactly the same process that's going to  
8 be gone through under the current proposal.

9 In fact, it may be that the process will be made  
10 somewhat easier, at least, by the fact that there are  
11 guidelines, that you now know that when somebody is devoting  
12 time both to managerial work and to non-managerial work, you  
13 know, based on the regulation, which side of the ledger it  
14 goes on. It's -- that's the answer. And I think it's a  
15 perfectly legitimate answer to come down with.

16 The final point I wanted to mention just briefly  
17 is that the language with respect to the presumption for  
18 people who are in charge is not a categorical exemption. I  
19 just -- I don't read it that way. I don't understand that  
20 to be the intent. It's just a presumption. Like many other  
21 presumptions, it's covered by the Evidence Code. But it  
22 does not, as I understand it, change any burden of proof and  
23 it will not create a categorical group of people with  
24 respect to whom there would be no further inquiry. So, I  
25 think any indication that that is what this language would  
26 do is just wrong.

1                   And with that, I'd be happy to answer any  
2 questions or turn over the microphone.

3                   COMMISSIONER DOMBROWSKI:   Sure.

4                   COMMISSIONER BOSCO:   Mr. Laidlaw, I have one  
5 question.   I've received a variety of letters from what you  
6 might call class action plaintiff lawyers.   And of course,  
7 all of them are against any sort of language such as we're  
8 considering today.   In your looking at the language and also  
9 having had a lot of experience in litigating these matters,  
10 would you say that this language or any part of it is  
11 tailored to end some of those lawsuits or undermine them, or  
12 would this language, if we enacted it, change the decisions  
13 in existing suits?

14                  MR. LAIDLAW:   Well, as I say, I mean, you still  
15 will have the lawsuits.   You will still have the same  
16 inquiry in the lawsuit, that is, you know, totaling up the  
17 ledger and seeing where it comes down.

18                  As I understand this, all it does is provide some  
19 clarification and some guidance with respect to the kinds of  
20 duties that are to be managerial by recognizing that mental  
21 work is a legitimate component of managerial work.   I would  
22 hope there's no dispute about that concept.   But this makes  
23 that absolutely clear.   And it also provides clear guidance  
24 as to what to do when somebody is legitimately doing  
25 managerial work and doing non-exempt type work at the same  
26 time.

1                   COMMISSIONER BOSCO: But my question's a little  
2 more -- I understand what the intent of it -- I'm talking  
3 about cases in existence now, major class action cases.  
4 Would this language, if we enact it, change the outcome of  
5 those cases, in your opinion?

6                   MR. LAIDLAW: Well, the truth is that the law on  
7 the heads and hands is unsettled in California. There are  
8 policies that the Division of Labor Standards Enforcement  
9 follows, but that is not the law. So, there's no statutes  
10 and there's no regulations that address that directly.

11                  COMMISSIONER BOSCO: Well, then, I guess my  
12 question is, would -- if we enacted this legislation, would  
13 they become more settled?

14                  MR. LAIDLAW: Yes.

15                  COMMISSIONER BOSCO: Thank you.

16                  COMMISSIONER DOMBROWSKI: Commissioner Broad?

17                  MR. YOUNG: But -- excuse me. Commissioner Bosco,  
18 it would be my contention it would be prospective, I mean,  
19 in the sense that we're acting today. I mean, those cases  
20 were -- again, whenever the action or if this Commission  
21 decided to act, at that point, prospectively, certainly it  
22 would put clarification. But what's occurred prior to that  
23 is -- would be under what is, again, I mean, a somewhat  
24 ambiguous set of circumstances that would be left to the  
25 court to decide. And this action would define future --  
26 would deal with future action and give clarity. Hopefully,

1   there wouldn't be cases because both sides would then have a  
2   definite -- a clearer definition of what is a manager and  
3   what isn't.

4               COMMISSIONER BOSCO:   Well, Mr. Young, as much as I  
5   have admired your advice for over thirty years --

6               MR. YOUNG:   I thought I'd try.

7               COMMISSIONER BOSCO:   -- are you trying to say that  
8   a court today wouldn't -- that has a case before it wouldn't  
9   take into account a decision that this Commission made, and  
10   even with a case before it?

11              MR. YOUNG:   Again, I guess that's ultimately left  
12   to the trier of fact.   But I would think that -- but I do --  
13   I do believe -- and certainly, that's not our intention with  
14   proposing this.   It is to do prospective and make a  
15   definition to go forward and not, certainly, try to deal  
16   with ongoing lawsuits.   And that's the -- if that's the --  
17   if a court decides to take that into consideration, I think  
18   it also speaks for the fact that this Commission really  
19   hasn't acted prior to that and would -- and in the absence  
20   of that, the courts have had to make what -- either case --  
21   by case law, their own decisions.

22              COMMISSIONER BOSCO:   Well, I wasn't trying to  
23   imply that you had even an eye toward the existing lawsuits,  
24   but I just wanted to make that point.

25              MR. YOUNG:   Right.   And I -- I mean, I --

26              COMMISSIONER BOSCO:   Thanks.



1 COMMISSIONER DOMBROWSKI: Commissioner Broad.

2 COMMISSIONER BROAD: Yes, sir. I have several  
3 questions.

4 You're familiar with the enforcement manual of the  
5 Division of Labor Standards Enforcement?

6 MR. LAIDLAW: Yes, I am.

7 COMMISSIONER BROAD: Okay. What's wrong with this  
8 list that, on Page 106 and 107, describes exempt duties?  
9 "Interviewing, selecting, training employees, setting and  
10 adjusting pay rates and work hours, directing the work of  
11 subordinates, keeping production records," et cetera, et  
12 cetera. Then it lists a set of things that aren't exempt  
13 duties: "performing the same kind of work that a subordinate  
14 is performing; any production service work, even though not  
15 like that performed by subordinates, which is not part of a  
16 supervisory function; making sales; replenishing stock;  
17 returning stock to shelves; except for supervisory training  
18 or demonstration purposes, performing routine clerical  
19 duties," et cetera, et cetera, et cetera. It's all very  
20 well defined. What's wrong with what we have there?

21 MR. LAIDLAW: Well, I think it doesn't address the  
22 question of whether somebody who is doing those things is  
23 also doing managerial work. This -- I don't believe that  
24 that --

25 (Laughter)

26 MR. LAIDLAW: -- and that -- and there may be

1 times, as I said, where they're -- may be lots of times when  
2 somebody who is engaged in those activities does not have  
3 any, you know, head component to what's going on. And that  
4 time will remain non-exempt time, as I understand it.  
5 There's no effort to say that when somebody's doing those  
6 things and there is no exempt or managerial component to  
7 their work, that that time would be treated as exempt. It's  
8 going to be non-exempt time.

9 So, there's nothing wrong with the list.

10 COMMISSIONER BROAD: Okay. Well, I'll tell you,  
11 I'm confused, but not that confused, by what you're saying.

12 What do you mean by doing work with your head and  
13 your hands at the same time? Are we talking about the same  
14 moment, the same moment in time, like I'm reaching for this  
15 mike and I'm talking? That's what you're talking about?

16 MR. LAIDLAW: Let's say that I'm wiping a counter  
17 and I'm telling an employee that there is -- a Coke got  
18 spilled on the floor and can they please get a mop and wipe  
19 it up.

20 COMMISSIONER BROAD: Okay. And that takes --

21 MR. LAIDLAW: And I am simultaneously doing -- you  
22 know, I guess someone would say I'm doing non-exempt work by  
23 wiping the counter, but I'm simultaneously attending to the  
24 management of the business by asking an employee to do  
25 something.

26 COMMISSIONER BROAD: Now, how long did it take you

1 to say that?

2 MR. LAIDLAW: How long did it take to wipe the  
3 counter? I mean --

4 COMMISSIONER BROAD: Five seconds, right? Now,  
5 what if you're -- now, we're talking about someone who's  
6 flipping burgers now for 60 percent of the day, not -- we're  
7 not talking about someone who's flipping burgers for 15  
8 minutes of an eight-hour day, we're talking -- and firing  
9 people the rest of the time.

10 (Laughter)

11 COMMISSIONER BROAD: We're talking about somebody  
12 who's flipping burgers for 60 percent of the day, right?

13 (Applause)

14 COMMISSIONER BROAD: Are we not? I mean, that's  
15 who we're talking about. You're saying during that portion  
16 of time, they're doing something simultaneously that's  
17 managerial, correct?

18 MR. LAIDLAW: They may be or they may not be.

19 COMMISSIONER BROAD: Okay. How do you demonstrate  
20 that they are?

21 MR. LAIDLAW: The same way you do it in any one of  
22 these kinds of situations. You have to take their  
23 deposition and ask them.

24 COMMISSIONER BROAD: Okay. So, you determine the  
25 length of their thoughts.

26 MR. LAIDLAW: Well, you --

1 (Laughter)

2 COMMISSIONER BROAD: No, I'm deadly serious about  
3 this. You determine the length of their thoughts and you  
4 add them up over the course of a day, while they're flipping  
5 a burger. In other words, you said -- you said, "Clean up  
6 -- clean up the shelves," and then had a series of other  
7 thoughts, like, "I have to go to the bathroom," "I need to  
8 go home soon," "I miss my wife," whatever. Those are not  
9 managerial thoughts, correct?

10 MR. LAIDLAW: What you're -- if that person, for  
11 example, is watching -- now, there will be hamburger cooks  
12 who are back, you know, in some obscure place where they  
13 can't see anything, they are completely, you know, isolated,  
14 they are in no position to be watching what's going on in  
15 the store, they can't see the register, they can't see the  
16 customers. And under those circumstances, there may not be  
17 any opportunity to be engaging in anything that qualifies as  
18 managerial work. But other managers who are in that  
19 position, at the stove or the grill or whatever, will be  
20 keeping an eye on what's going on, will be watching and  
21 monitoring the operations of the store. That's what they're  
22 being compensated to do. And if they're managers, exempt  
23 managers, they're being compensated at twice the minimum  
24 wage.

25 Well, how long does it take --

26 COMMISSIONER BROAD: But that's not the thought

1 that they're having. They're not having a thought, "I'm  
2 monitoring the store." They're looking around. That takes  
3 two seconds. And then they spend the next fifteen seconds  
4 thinking about a whole bunch of other things, right, because  
5 they're -- these are human beings we're talking about, with  
6 a physiology of their brains that has them engage in a  
7 succession of thoughts. We don't engage in managerial  
8 thoughts eight hours a day, do we?

9 MR. LAIDLAW: I would assume that's accurate. But  
10 I --

11 COMMISSIONER BROAD: Okay. So, how would we  
12 enforce this rule?

13 MR. LAIDLAW: The same way that the rule is  
14 enforced now when there's a dispute. You have to -- it's a  
15 fact-intensive inquiry. The California Supreme Court has  
16 recognized that. All the courts recognize that this is not  
17 something where there's a bright-line test and it's a piece  
18 of cake. This is not a piece of cake. You have to go  
19 person by person, under current law and, I assume, under any  
20 newly enacted law.

21 MR. FINE: Why don't we look --

22 MR. LAIDLAW: Yeah, go ahead.

23 MR. FINE: Let me try to answer that.

24 My name is Ned Fine. I'm a management attorney  
25 here in the state. I've been practicing in this arena for  
26 thirty years.

1                   What we're arguing about, Mr. Broad, you well  
2 know, is essentially the *Burger King* rationale. *Burger King*  
3 was a case under the federal law that deemed a Burger King  
4 manager still managing the store -- that was his primary  
5 duty even if he's flipping burgers, as long as he's keeping  
6 an eye on the store. You talk to all the other workers in  
7 the store, "Who's the boss?" "That's him, over there."  
8 "Where is he? Oh, he's flipping burgers." "Yeah, but he's  
9 keeping an eye on all of us." They know he's the boss.  
10 That's his primary duty.

11                   The short answer as to how you interpret this, how  
12 you apply this, is it a quagmire you're now jumping into?  
13 No. You would be finally -- and I commend you for having  
14 these regulations that basically make --

15                   COMMISSIONER BROAD: They're not -- they're not --  
16 they're not mine.

17                   MR. FINE: I know they're not yours. I know that  
18 well, they're not yours. But I commend you for making the  
19 California test now closer to the federal test.

20                   COMMISSIONER BROAD: Oh. So, wait. So, what  
21 you're saying is we're going to resolve the *Burger King*  
22 case. We're going to fix this and establish a "primary  
23 duty" test in California. is that what you're saying?

24                   MR. FINE: Not quite. This makes it --

25                   COMMISSIONER BROAD: Not quite?

26                   MR. FINE: You have a 51 percent test that AB 60

1 mandates.

2 COMMISSIONER BROAD: Yes.

3 MR. FINE: You have the 2x of minimum wage for  
4 compensation which AB 60 mandates.

5 COMMISSIONER BROAD: Uh-huh.

6 MR. FINE: But the whole point is, of this  
7 Commission proposal, is that it, in my view, tracks better  
8 federal law than up to now.

9 The Labor Commissioner loves to follow federal law  
10 when it's helpful and appropriate. I commend you every time  
11 you try to bring the IWC rules to track the federal law. We  
12 have national employers here with fifty states with  
13 operations, and they go crazy with what happens in  
14 California. It's a major impediment. I don't see why, in  
15 this situation, that there is an absolute compelling need  
16 for the IWC to have a special rule for California managers.

17 COMMISSIONER BROAD: Because the Legislature  
18 enacted the rule.

19 MR. FINE: They enacted a rule providing the 51  
20 percent test and the 2x minimum wage, which is fine.

21 COMMISSIONER BROAD: Which is the difference  
22 between it and federal law, as has been the case in  
23 California for fifty years.

24 MR. FINE: That's right, except I would also  
25 suggest, whenever the IWC goes beyond the federal law and  
26 provides more protection, there is now a new opportunity for

1 the lawyers of the State of California to, thankfully, find  
2 the federal law preempts. The federal law clearly permits a  
3 state to be tougher with respect to having a higher minimum  
4 wage, and it permits the states to be tougher with respect  
5 to having a higher maximum hours. That's exactly the words  
6 from the statute. As soon as you start tinkering with all  
7 the other rules, it opens itself up to a major federal  
8 challenge.

9 COMMISSIONER BROAD: So, your view -- your view,  
10 then, is that when we're defining the nature of the duties -  
11 - let's leave aside trying to bring back in the "primary  
12 duty" test through some clever little exercise here, because  
13 I think that's what you're doing -- but anyway, you think  
14 that we should follow what the federal criteria are for  
15 duties. Is that correct?

16 MR. FINE: Whenever possible, except -- unless  
17 there's a compelling business reason or purpose.

18 COMMISSIONER BROAD: Then perhaps I can lead you  
19 through and ask you why you left so many of them out in this  
20 proposal.

21 (Applause)

22 COMMISSIONER BROAD: Okay. Now, let's go -- let's  
23 go through that and let's talk about it, and you can tell me  
24 why you left each one of these out.

25 MR. YOUNG: Commissioner Broad, with all due  
26 respect, we've indicated that the language that's before the



1 Commission, we ask, before -- we ask the Commission to  
2 withdraw that because it was -- I -- to say it's inartful,  
3 perhaps, again, it's a work in progress that needs more  
4 consideration, and we hope to have a dialogue with, again,  
5 organized labor. As I said, it wasn't our intention --  
6 intent to in any way disturb the relationship of a  
7 journeyperson.

8           And with all due respect to Mr. Fine, he wasn't in  
9 the work in developing that. And rather than go through  
10 that, we'll present back to the Commission language that  
11 does mirror closer to the federal duties. Rather than leave  
12 them to interpretation by the Labor Commissioner, we will  
13 enumerate them.

14           COMMISSIONER BROAD: Okay. Well, let's assume  
15 that you'll bring something back that's closer to the  
16 federal set of duties, which -- my understanding, it cites  
17 the Code of Federal Regulations in the DLSE manual, so those  
18 are the federal duties. So, maybe we can dispense with this  
19 by just agreeing to what we have, which are the federal  
20 duties.

21           MR. YOUNG: But -- well, okay. All right.

22           COMMISSIONER BROAD: Now, let's go on to the  
23 presumptions, because I'd like to ask some questions about  
24 those.

25           I'm reading from AB 60, Section 515(e): "For the  
26 purposes of this section, 'primarily' means more than one

1 half of the employee's work time." Then we have not one,  
2 but two Supreme Court decisions in the last six months, of  
3 the California Supreme Court, talking about the "primarily  
4 engaged" rule. Where in this bill does it give the  
5 Commission authority to create a presumption that someone  
6 that's working more than 50 percent time on non-exempt  
7 duties can be presumed to be engaged in exempt duties?  
8 Where is there authority for that presumption?

9 MR. LAIDLAW: It's in 515(a), where it says that  
10 the IWC can adopt or modify regulations that pertain to the  
11 duties. This is a regulation, and it pertains to the  
12 duties. It indicates that when somebody's in charge, it  
13 creates a rebuttable presumption that they are performing  
14 certain kinds of --

15 COMMISSIONER BROAD: So, in fact, there is a  
16 presumption that they're performing those duties  
17 irrespective of how much time they're actually engaged in  
18 duties. That's the presumption. I mean, you want me to  
19 read it to you?

20 MR. LAIDLAW: It is a presumption, but you asked  
21 what the authority was. And I'm saying that's the  
22 authority.

23 COMMISSIONER BROAD: Well, it seems, in my view,  
24 to flat-out contradict the statute.

25 MR. LAIDLAW: But you don't -- but the statute is  
26 not thrown out. You still -- if it comes to a litigated

1 situation, you still -- the employer still has to  
2 demonstrate that the employee is spending more than 50  
3 percent of their time in managerial work.

4 COMMISSIONER BROAD: Yes, but it would be us  
5 giving employers the legal right to presume something when  
6 they have no legal right to categorize anyone as exempt  
7 unless they work more than 50 percent of their time in  
8 exempt duties. So, it's handing a litigation opportunity to  
9 a lot of people that make the grand sum of nineteen hundred  
10 bucks a month. That's -- that's what you're doing, right?  
11 Or wrong?

12 MR. LAIDLAW: This is -- it's just an evidentiary  
13 presumption. It doesn't change the burden of proof. I  
14 don't understand -- I don't believe that this would even  
15 come into play in 99 percent of litigated cases. And I  
16 think it's within the scope of 515(a).

17 COMMISSIONER BROAD: Okay. All right.

18 Now, the paragraph above says:

19 "The time devoted by an employee to these and  
20 any other managerial duties is exempt time for the  
21 purposes of determining whether the employee is  
22 primarily engaged in managerial work, even if that  
23 employee is simultaneously performing other tasks,  
24 such as production work, that might be  
25 characterized as non-exempt."

26 Now, does that -- does that language not ask us to simply

1 throw away and disregard conduct which is non-exempt and  
2 categorize it as exempt? I mean, at that moment, they're  
3 flipping burgers, right?

4 MR. YOUNG: But -- wait. Wait. Excuse me.

5 MR. FINE: But you've come to the conclusion that  
6 flipping burgers is his primary duty, when, in fact, he's  
7 keeping an eye on the store. You're --

8 COMMISSIONER BROAD: No, we have no -- we have no  
9 "primary duty" test in California, period.

10 MR. FINE: I know, but what is he really doing?  
11 Are you paying him \$30,000 a year to flip burgers? No,  
12 you're paying him \$30,000 to watch the store. And  
13 meanwhile, at times, he has to flip burgers.

14 COMMISSIONER BROAD: No, that is the -- that is a  
15 description, again, of a "primary duty" test. We have a  
16 time-based test in California, not a "primary duty" test.  
17 It doesn't matter what the employer is -- is in the  
18 employer's mind; it only matters what the worker is doing.

19 MR. YOUNG: Commissioner Broad, listen. I think  
20 you've pointed out areas that -- where, again, we need to  
21 come back and redraft this language and be cognizant of  
22 them. And we will do that. And --

23 (Audience murmuring)

24 MR. YOUNG: I'll stop talking while they're  
25 interrupting. But let me just finish my thought on this.

26 But the point is, is that the difference, I think,

1 where we depart is that we believe that you can do those  
2 activities on a concurrent basis, that you don't become less  
3 of a manager. Certainly, again, you must be primarily  
4 engaged in the duty of management. But the problem is that  
5 under the Department of Labor current interpretation, the  
6 minute the manager grabs a cash register, he or she ceases  
7 to become a manager. And that's the point where we  
8 disagree.

9           And we believe -- again, as I said, we have to  
10 come back with language that better expresses that -- but  
11 it's that concurrent hand and mind, not the substitution  
12 effect, I mean, that, again, somebody can work at a register  
13 24 hours -- or eight hours a day, and that person becomes a  
14 manager. The bottom line is we -- what we're trying to get  
15 at is the fact that when that person, as the exception, not  
16 the rule, takes those duties that you enumerated, that  
17 person continues to be the supervisory person in charge of  
18 that, with the same responsibilities.

19           And that's -- and again, we -- the language in  
20 front of you needs to be rewritten. We will rewrite that  
21 and address the things you've pointed out.

22           COMMISSIONER BROAD: Okay. Let me -- and I think  
23 that's a good idea. Let me also just make some points here  
24 about this that I'm concerned with.

25           While you're rewriting this, you might consider  
26 the differences between the Fair Labor Standards Act lists

1 of duties and the -- some of the concepts you've thrown in  
2 here, like "ensuring customer satisfaction," which is found  
3 nowhere that I can find. And every worker in the whole  
4 state that deals with the public ensures customer  
5 satisfaction. So, that was like grabbing a little too much.

6 And this stuff where it says, "Examples of duties  
7 include, without limitation," and then there's a list of  
8 duties, so it's all those duties plus everything else that  
9 anyone could think of possibly doing.

10 MR. YOUNG: Right.

11 COMMISSIONER BROAD: So, that, obviously, is  
12 pretty far out there.

13 And there are also subtle things that were done  
14 here, but don't believe that people have missed them, which  
15 is the federal test requires that you work -- that the work  
16 "consists" of those duties, not that they're "performed for  
17 the purpose of or in connection with" the duties, because  
18 that starts to get it off in very vague areas.

19 There's also language in federal law that requires  
20 that the employee be supervising or be managing, rather, a  
21 customarily or recognized department of two or more people,  
22 that they cannot be doing the same work as their  
23 subordinates, a matter which is quite critical here that is  
24 in federal law. And I think if you were to reintroduce that  
25 concept, they can't be doing the same work as their  
26 subordinates, then maybe we'd take about 99 percent of the

1 problem away and resolve the thing quite clearly for you.

2 So, as you're rethinking this proposal, perhaps  
3 you should rethink it along the lines of what the federal  
4 law does, in fact, say about the description of duties.

5 Be mindful that we can't repeal the "primarily  
6 engaged" test. We can only look at the definitions of the  
7 duties.

8 COMMISSIONER DOMBROWSKI: Barry --

9 COMMISSIONER BROAD: Thank you.

10 MR. LAIDLAW: Commissioner, may I just point out  
11 that the duties that are actually listed in the federal  
12 regulations are only relevant to the long test, which is for  
13 individuals who are making less than \$250 a week. If  
14 they're making -- people are making more than \$250 a week,  
15 the lists in the regulations aren't relevant. Then you  
16 revert to the "primary duty" test. Because the California  
17 statute is -- obviously requires two times the minimum wage,  
18 that's going to get somebody well above \$250 a week. And as  
19 a result, the lists of exempt and non-exempt duties set  
20 forth in the federal regulations simply aren't applicable to  
21 somebody with that level of pay.

22 MR. YOUNG: Mr. Chairman, again, I think we  
23 appreciate Commissioner Broad's comments. We're going to  
24 take them under advisement, and we'll be mindful of that  
25 when we bring this back. In the interests of time, perhaps  
26 we could have the rest of our witnesses.

1                   COMMISSIONER DOMBROWSKI: That's what I was going  
2 to suggest. Let's --the other three witnesses, identify  
3 yourselves.

4                   MS. BROYLES: Good morning, Mr. Chairman -- the  
5 new Mr. Chairman, Mr. Dombrowski -- and members of the  
6 Commission.

7                   Julianne Broyles, from the California Chamber of  
8 Commerce.

9                   Certainly, listening to the debate this morning on  
10 the issue of the managerial duties has been one that I think  
11 is very necessary, especially in light of the Labor Code  
12 permitting the Commission to examine managerial duties and  
13 to modify, change, or in some way amend the list of duties.  
14 And certainly, the points that Commissioner Broad brought up  
15 are very important ones.

16                  I don't believe that the California Chamber or the  
17 other members of our California Employers Coalition would  
18 have any problem with continuing this discussion, as the  
19 Commission has brought new language and new definitions, and  
20 possibly new lists of duties, and would be very happy to be  
21 part of that discussion.

22                  The language that was on the agenda today,  
23 certainly, we believed, would have clarified the list of  
24 duties and provided some assurance for employers when  
25 they're classifying their workers. We think that a broader  
26 definition, closer or mirroring the federal definition,



1 certainly would be helpful for employers and maybe avoid the  
2 litigation in the first place, if there's some certainty or  
3 established list, on both sides, Mr. -- Commissioner Broad,  
4 where the DLSE, you correctly pointed out, has a list of  
5 both the duties and those duties that are not considered  
6 exempt duties. I don't think either one would be  
7 inappropriate to examine by the Industrial Welfare  
8 Commission.

9 I would like to make sure that several specific  
10 organizations also are acknowledged as being interested, as  
11 part of this discussion. And that is, besides the  
12 California Chamber of Commerce, it's the California League  
13 of Food Processors, the California Landscape Contractors,  
14 Associated General Contractors, the Lumber Association of  
15 California and Nevada, and the California Hotel and Motel  
16 Association have also indicated that they are strongly  
17 interested in this issue and would like to be part of the  
18 ongoing dialogue.

19 COMMISSIONER DOMBROWSKI: Thank you.

20 MR. ROSS: Jon Ross, on behalf of the California  
21 Restaurant Association.

22 Our members, obviously, fall squarely in the  
23 middle of this debate. We're among those whose managers'  
24 work often doesn't fit neatly into the two boxes that were  
25 described earlier this morning by the DLSE witness. We  
26 welcome this debate and welcome the opportunity to work with

1   you more as this goes forward.

2                   MR. ABRAMS:   Jim Abrams, the California Hotel and  
3   Motel Association.

4                   A suggestion:   I think the key here is that people  
5   are trying to find a way to take all of the types of cases  
6   which, right now, for the DLSE and/or the courts, are  
7   creating real problems because the tests and criteria are  
8   very hard to define.   And the more that this Commission can  
9   give people guidance, both employers and employees and the  
10   enforcement agencies, the better off we're going to be.

11                  For example, we have, in the lodging industry,  
12   just as an example, executive chefs, executive housekeepers.  
13   And I think there needs to be some kind of a consideration  
14   given to the whole issue of trying to provide bright-line  
15   tests.

16                  I would like to suggest, though, that the  
17   Commission give some consideration, first of all, to coming  
18   up with some general language, not necessarily the language  
19   that's been presented to you, because I think we all agree  
20   that there are some issues that need to be addressed, but  
21   then going and looking at specific wage orders.   For  
22   example, one of the most contentious situations involving  
23   the lodging industry has to do with an individual, or  
24   perhaps a husband and a wife, who are managing a motel and  
25   trying to decide at what point might they arguably be truly  
26   exempt managers and at what point not.   And I'd like to

1 suggest that there are probably, in the retail industry and  
2 others, some very specific situations where those particular  
3 wage orders could be crafted with some additional clarity  
4 that would make it easier for people to understand exactly  
5 how the test is to be applied.

6 Thank you.

7 COMMISSIONER DOMBROWSKI: I assume there's no  
8 questions.

9 Mr. Pulaski, if you could bring up your witnesses.  
10 We've obviously run over time. We try to be generous.

11 (Pause)

12 COMMISSIONER DOMBROWSKI: Go ahead, Art. Go  
13 ahead.

14 MR. PULASKI: Chairman Dombrowski, members of the  
15 Commission, thank you for the opportunity to address you  
16 today. My name is Art Pulaski, from the California Labor  
17 Federation.

18 I first must acknowledge and thank, through the  
19 chair, the many working people who join us today in this  
20 hall behind me, who took the day off to express their -- the  
21 depth of their concern about the attempts to take away their  
22 daily overtime pay. I also want to acknowledge and thank  
23 the people who I think can view us through these monitors,  
24 who, because this room reached overflow capacity, have  
25 filled up the room next door, and, as I wandered into the  
26 hall a few minutes ago, are wandering out of that room into

1 the hallway. I want to thank and acknowledge you all for  
2 coming today too and taking time off of work to do it.

3 We have a panel of people representing various  
4 interests of workers, which we will introduce to you. I  
5 will go through the names very quickly right now for you.

6 The first is Scott Wetch, political director of  
7 the State Building and Construction Trades Council; Bruce  
8 Hartford, secretary treasurer of the Writers -- National  
9 Writers Union of the UAW; Michael Zakos, a nurse at Kaiser  
10 Mental Health in Los Angeles, a member of UNAC and AFSCME;  
11 and Sonia Moseley, a California Labor Federation vice  
12 president and executive vice president of UNAC and AFSSME,  
13 the nurses; Rosalina -- Rosalina Garcia, from Sutter  
14 Building Maintenance, nonunion worker, she is part of a  
15 class action lawsuit against that company for violating  
16 daily overtime provisions; Matt McKinnon, who is the  
17 executive secretary of the California Conference of  
18 Machinists; John Getz, a grocery store clerk at Albertson's  
19 in Buena Park, southern California, member of IBEW -- I beg  
20 your pardon -- member of UFCW Local 324; and also from that  
21 local, Dan Kittredge, also a grocery clerk, from Ralph's  
22 grocery store in Buena Park; Edward Powell, secretary  
23 treasurer of the California State Theatrical Federation; Uwe  
24 Gunnerson, from the Operating Engineers Local 3; Judy Perez,  
25 vice president of the Communication Workers, Local 9400; Ken  
26 Lindeman, former -- former Taco Bell and Wendy's worker, and

1 also part of a class action lawsuit on unpaid overtime  
2 wages; Allen Davenport, legislative director of the  
3 California State Council of Service Employees; and my  
4 partner, Tom Rankin, president of the California Labor  
5 Federation.

6 I will, if you would, please, open with a few  
7 comments of my own.

8 If I heard Mr. Young correctly, what seems now  
9 like hours ago, the representative of the Retailers  
10 Association claimed that the language proposal before you on  
11 management definitions for the purposes of exemption of  
12 daily overtime, that that language is the result of some  
13 kind of cooperative effort between the labor movement and  
14 them as -- during the process of negotiations over AB 60,  
15 the daily overtime law, I have to say that if I heard him  
16 correctly, and if you can go to jail for lying before this  
17 committee, then we ought to call the posse, slap on the  
18 cuffs, and throw him in the slammer.

19 COMMISSIONER DOMBROWSKI: Art, I will agree with  
20 you that that is not language that you have -- that is not  
21 language that you have participated in crafting or agreed to  
22 or anything else.

23 MR. PULASKI: Thank you.

24 And further, let me say that we had no  
25 participation whatsoever in the discussion around the  
26 language before you. And I only wish that there was an

1 opportunity for us to have done that, because we should  
2 always attempt to work things out amicably in ways that work  
3 for everybody. But sadly, we had no opportunity for  
4 participation or discussion or input whatsoever in the  
5 proposals, these and the proposals, others which you set  
6 aside, in terms of stock options that were now before the  
7 Commission.

8           Barely three months ago, I appeared before this  
9 Commission to testify on what I think is a most urgent need  
10 for the people of California, and that is the raising of the  
11 minimum wage from the poverty level of \$5.75 per hour. The  
12 proposals that now come before this Commission and distract  
13 this body are proposals that will not result in an increase  
14 in the poverty wages of workers of California, but, in fact,  
15 unfair pay cuts to hard-working Californians. And we see  
16 attempts to redefine what is management, which is an  
17 extraordinary attempt to redefine management, in a way that  
18 will simply dismantle the ability of workers to earn daily  
19 overtime pay in California.

20           Also, the stock option bonus plan, profit-sharing  
21 plan, which you have set aside, the exemptions on that are  
22 wholesale deprivation of daily overtime to workers of  
23 California. And we expect that there will be long  
24 discussions about those as they come up before you again.

25           I want to share with you, if I may, my own  
26 experience. You see, I started work as a 16-year-old as a

1 stock clerk in a supermarket. And my job duties as a stock  
2 clerk in that supermarket were to take charge of the dog  
3 food and cat food aisle -- it was really a quarter of an  
4 aisle of the supermarket store -- and also the ketchup.  
5 Now, my responsibilities included, every Friday, to assess  
6 how much ketchup and dog food was sold, and then to order  
7 next week's ketchup and dog food. And so, I had, I guess,  
8 management responsibilities there, although I was the  
9 youngest and the least senior of all the people that worked  
10 in the A&P supermarket, and there were some 65 of them. I  
11 was the lowest person on the totem pole.

12           Now, the other thing I had was a very, very  
13 important duty. And when something happened like this, I  
14 had to stop everything and drop it. When we -- when, in my  
15 quarter of the aisle that I had responsibility, when a  
16 bottle of ketchup dropped on that floor, my job was to stop  
17 everything and get a mop and clean up that ketchup, because  
18 we wanted to be sure that no customers fell down on that  
19 ketchup. We wanted to be sure that the company wasn't sued.

20           Now, being the low man on the totem pole, I  
21 realized that this would -- if you read these proposals  
22 before the Commission -- would define me as a manager,  
23 because I ordered merchandise and I protected the safety of  
24 those customers from the ketchup.

25           Now, if I had known I was a manager, I would have  
26 asked for a big raise, or at least, members of the

1 Commission --

2 (Laughter and applause)

3 MR. PULASKI: At least, members of the Commission,  
4 I would have requested some stock options in my company.

5 (Laughter)

6 MR. PULASKI: Now, sadly for me at the time, I  
7 didn't get them. Good for me now, because that company was  
8 the A&P supermarkets chain, one of the largest chains in the  
9 country for selling groceries, and that chain, seven years  
10 later, went out of business, and I would have lost my shirt  
11 if I had got stock options instead of my overtime pay.

12 And if you look at the companies now in this state  
13 that want to get rid of daily overtime for stock options,  
14 there -- and the supermarket was a basic industry, right?  
15 It provided the staples for people in the community. We  
16 thought that would be the last store to close down. And now  
17 you've got dot coms dropping like flies. But yet, they're  
18 claiming that they want to protect those workers by giving  
19 them those stock options.

20 So, California has, for a long time, provided a  
21 strong standard for determining who is a manager and who is  
22 not a manager. Assembly Bill 60, our bill to re-establish  
23 daily overtime, has affirmed that emphatically. And I'm  
24 going to take the liberty here to read you merely one  
25 sentence of that new law, signed by Governor Gray Davis.  
26 And I quote from Chapter 134 of that law, that says: "The



1 Legislature affirms the importance of the eight-hour workday  
2 and" -- this is all one sentence -- "and declares that it  
3 should be protected, and reaffirms the state's unwavering  
4 commitment to upholding the eight-hour workday as a  
5 fundamental protection for working people."

6 (Applause)

7 MR. PULASKI: California law -- California law  
8 says that workers who are primarily engaged in non-  
9 management tasks for more than half of their work hours are  
10 not managers. We apply a strict quantitative test, which  
11 this Commission reaffirmed in 1988 and has lasted through a  
12 Republican administration and Democratic administration,  
13 through Pete Wilson, through George Deukmejian, and many  
14 others. Workers who spend less than 50 percent of their  
15 time on management tasks are eligible for overtime pay.

16 The proposal before you today would weaken that  
17 standard dramatically and cut paychecks for hundreds of  
18 thousands of California workers. I dare say that the way I  
19 heard these managers, representatives of labor, speak -- of  
20 management, speak earlier, it may be millions. It would  
21 allow employers to reclassify workers who perform weakly  
22 defined management tasks, and merely a few of them, such as  
23 ordering ketchup, cleaning up ketchup, ensuring customer  
24 satisfaction -- make sure they know where to find the  
25 ketchup, and the ordering of merchandise. That's being a  
26 "manager," but we can never let that and we won't let that

1   happen in the State of California.

2               You know, employers have been skirting the law all  
3   over the place already. In recent years, they have been  
4   misclassifying employees as independent contractors. The  
5   state has spent a lot of money defending those workers in  
6   that case. The proposal before you today presents the same  
7   opportunities for companies to engage in a new kind of  
8   abuse. It would cut the pay of hard-working Californians.

9               And let me say this. We should make sure that we  
10   use the language properly. Instead of calling this "re-  
11   classification," instead of calling this "exempt status," we  
12   ought to call the words what they are, and that is, we are  
13   denying, denying, denying workers daily overtime pay. We're  
14   not exempting them, we're denying them. And we're cheating  
15   them. So, let's be sure that we use the language properly.

16              I'm going to not do this because of time, but I  
17   would refer you, and hope you read it, an article last  
18   Friday in the newspaper, *San Francisco Chronicle*, that talks  
19   about the experience of one person in the dot com industry,  
20   who is now one of many, many who are suing their companies  
21   because they are skirting the law and trying to get around  
22   from paying them their rightful daily overtime.

23              Let me conclude by this. These proposals would  
24   dramatically cut the pay of hard-working Californians in  
25   almost every industry in this state. And appallingly, it  
26   comes at a time of record profits for companies and salaries

1 for chief officers. The booming economy is a bust for too  
2 many workers in this state whose wages are not keeping up  
3 with the cost of housing, childcare, transportation, and  
4 much more. And we vigorously urge you to reject and deny  
5 the concept of this and get on with the business of raising  
6 the wages of minimum wage for the workers, hundreds of  
7 thousands of them, in the State of California, to do  
8 something good for the people of this state.

9 I thank you very much.

10 (Applause)

11 MR. PULASKI: Mr. Chairman, next we have Scott  
12 Wetch.

13 MR. WETCH: Mr. Chairman, Scott Wetch, of the  
14 State Building and Construction Trades Council.

15 First, I'd like to disagree with my friend, Bruce  
16 Young. I think that this language was artfully drawn.  
17 Unfortunately, it reads like a Picasso. And therein lies  
18 the problem.

19 The legal points in regard to the broadening of  
20 the definition of managerial duties were well covered in the  
21 last panel by Commissioner Broad. However, what I'd like to  
22 do is provide a practical perspective on what this  
23 amendment, if adopted, would mean in the construction  
24 industry. And we believe that it would provide an  
25 opportunity to undermine the rich tradition of the  
26 construction industry, whereby the skills and the knowledge

1 of various crafts is literally handed down from one  
2 generation to the next on the job site. Moreover, this  
3 amendment has the opportunity to have a chilling effect on  
4 workplace safety and would cripple California's nationally  
5 recognized system of apprenticeship training as we know it.

6           Make no mistake, this new definition provides a  
7 clear path, a clear avenue, for construction employers to  
8 reclassify rank-and-file journeymen as managers. Every day,  
9 on every construction job site in California, lead  
10 journeymen direct and monitor the work of apprentices and  
11 younger, less experienced employees. As a matter of daily  
12 activity, journeymen decide what types of materials,  
13 supplies, or tools to be used, and determine and demonstrate  
14 the techniques to be used, all of which would classify them  
15 as managers and exempt them from daily overtime under this  
16 proposal.

17           The practical consequence of this new definition  
18 is that employers in the construction industry will re-  
19 classify as many journeymen as they can to managers, paying  
20 them under the salary provision, and then journeymen who  
21 aren't reclassified will be reluctant to take the leadership  
22 roles that are needed on a job site. They will refuse to  
23 pass on the skills of the trade to apprentices and less  
24 experienced workers for fear of being converted to  
25 management status. As a result, substandard construction  
26 will proliferate, job safety will be severely compromised,

1 and the construction -- the construction job site hierarchy  
2 as we know it will be thrown into confusion.

3 For these reasons, the State Building and  
4 Construction Trades Council urges you to reaffirm this  
5 Commission's statutory responsibility to protect the rights  
6 of workers and reject this ill advised and harmful proposal.

7 MR. PULASKI: Bruce.

8 (Applause)

9 MR. HARTFORD: Mr. Chairman, my name is Bruce  
10 Hartford. I'm secretary treasurer of the National Writers  
11 Union. We represent technical writers and hourly paid  
12 technical writers, primarily in the computer industry.

13 My position -- my union position, however, is  
14 unpaid volunteer. I myself make my living as a full-time  
15 technical writer in the Silicon Valley computer industry.  
16 Over the past nineteen years, I worked for companies like  
17 Digital Microsystems, Apple Computer, Relational Technology,  
18 Sun Microsystems, Netscape Communications -- essentially all  
19 the usual suspects.

20 As everybody knows, long, long hours are the norm  
21 in the computer industry. And that's what we're primarily  
22 concerned with. Until computer professionals were brought  
23 under protection, overtime protection, by AB 60, there was  
24 no economic incentive for computer industry employers to  
25 have any concern with how many hours they were requiring  
26 their people to work.

1           As soon as your Commission issued the wage order,  
2 or the ruling, that overtime had to be paid for hourly  
3 professionals, immediately companies began to say, "Wait a  
4 minute. How many hours?" Hewlett Packard, for example,  
5 issued an order to their managers that said no overtime  
6 unless specifically authorized in writing. So, it had an  
7 immediate beneficial effect.

8           Now, I'm not here -- we're not here as computer  
9 professionals because we want more money. We're here  
10 because we want less required overtime. The whole point of  
11 the eight-hour day and the 40-hour week was to protect the  
12 health and safety of the workers and to provide and ensure  
13 that we have time to spend with our families. And the need  
14 to spend time with families and to have a human life does  
15 not -- it applies to anybody, no matter how much we're paid.  
16 I have as much right to spend time with my family and with  
17 children and have a social life as somebody who makes half  
18 of what I make.

19           The other -- the other issue is the question of  
20 health and safety. Now, when people think about health and  
21 safety, the natural thing to do is you think of jobs that  
22 are dramatically unsafe, like firefighter or coal miner or  
23 longshoreman. But there are serious health problems in the  
24 computer industry at the professional level. Repetitive  
25 stress injuries are endemic in our industry, carpal tunnel  
26 syndrome, for example. A number of our members are crippled

1 for life and can no longer work because of carpal tunnel  
2 syndrome. These injuries are directly related to the number  
3 of hours you're keyboarding at your computer terminal.

4 I don't know how many of you have had a chance to  
5 visit a large computer company, but, basically, they're set  
6 up where they have these huge rooms that are divided into  
7 thousands of little cubicles, with -- and it's easy to get  
8 lost as to where you are among the cubicles. But I always  
9 -- I never have any trouble finding the tech writers section  
10 because all I have to do is look for the cubicles where  
11 people are wearing lace-up leather braces on their wrists  
12 because they -- because of carpal tunnel syndrome and RSI,  
13 and I know I'm in the technical writers section.

14 COMMISSIONER DOMBROWSKI: Excuse me. Excuse me.  
15 I'll let you continue, but I -- we wanted to talk about the  
16 manager duties, and I'm trying to --

17 MR. HARTFORD: Oh. Well --

18 COMMISSIONER DOMBROWSKI: -- figure out where  
19 you're going on this.

20 MR. HARTFORD: Basically, I came here to talk  
21 about protecting computer professionals, overtime.

22 Let me just say one thing about -- about -- and  
23 this does affect managers. Most of the people at the  
24 professional level in the computer industry are salaried  
25 employees. But more and more of us are now -- are now  
26 finding ourselves working as hourlies through temp agencies.

1 And this has now gone from technical writers, programmers,  
2 and engineers into managers. There are managers of  
3 departments who I work for who are themselves hourly temps.  
4 In fact, I heard of a case this morning where the vice  
5 president of a company is an hourly temp.

6 Now, these temp agencies that we work for take a  
7 third to a half of everything that is paid for our work.  
8 So, for example, if I'm getting \$100 an hour, I actually --  
9 that is, if \$100 an hour is being paid for my work, I only  
10 get \$55, for example. The agency gets \$45. That would  
11 apply also to a temp manager. But the agencies do not  
12 provide health benefits, pension benefits, vacation pay,  
13 paid holidays, any of the kinds of benefits that normally a  
14 worker has a right to expect. And this applies to managers  
15 as well.

16 So, it seems to me that, from what we've seen,  
17 it's the temp agencies who've been the primary movers to try  
18 and exclude computer professionals from overtime protection,  
19 because they get a huge amount for every hour we work. They  
20 want us to work as much overtime as they can force us to do.  
21 We want to be protected. We want to have the eight-hour day  
22 defended for us.

23 And basically, I guess maybe I apologize if I'm on  
24 the wrong speakers list here. I came up when I heard this.  
25 It was in the newspapers. I apologize if I wasted your  
26 time.



1                   COMMISSIONER DOMBROWSKI: No, no. It's perfectly  
2 fine. You have a right to speak. I just wanted just to  
3 point out again we're talking about the manager duties.

4                   Next speaker.

5                   MR. PULASKI: Michael.

6                   MR. ZAKOS: Good morning, Mr. Chairman. My name  
7 is Michael Zakos. I live in West Covina, California, and  
8 I'm a staff nurse at Kaiser Permanente in Los Angeles. I've  
9 been a nurse for 22 years, and I'm also a member of the  
10 United Nurses Association of California.

11                   In regards to today's proposal, speaking for  
12 myself and fellow nurses, we, on a daily basis, are expected  
13 to train other employees, direct, monitor, schedule, and  
14 plan work for subordinates. We provide for the safety of  
15 patients, we resolve patient complaints, and ensure patient  
16 satisfaction. Not only do nurses perform these duties, but  
17 all employees are expected to perform most of these above  
18 duties. The mission and goals of Kaiser Permanente and  
19 other hospitals is that all employees are to ensure that  
20 patients are safe and satisfied at all times.

21                   How can anyone say time spent performing these  
22 duties will be exempt, when we are doing this constantly  
23 throughout our shift? I can just see the industry saying,  
24 "Good, we don't have to pay them any more overtime any  
25 longer."

26                   In conclusion, this proposal not only erodes

1 monetary compensation, but then it would also erode the  
2 principle of autonomy, leadership, and the personal  
3 investment in doing a job well done. I ask you to reject  
4 and not use these duties to exempt payment of overtime.

5 MS. MOSELEY: Good morning, Mr. Chairman and  
6 commissioners. My name is Sonia Moseley, and I'm a  
7 registered nurse practitioner and the executive vice  
8 president of the United Nurses Associations of  
9 California/AFSCME. We represent approximately 11,000  
10 registered nurses, registered nurse practitioners, and  
11 physician assistants in southern California.

12 We are very concerned about this proposal. As  
13 Michael just said, all nurses and most hospital employees  
14 could be considered managerial based upon some of the  
15 following items outlined in your proposal, such as training  
16 employees, directing and monitoring the work of  
17 subordinates, resolving customer complaints, ensuring  
18 customer satisfaction, and providing for the safety of  
19 customers.

20 For healthcare workers, it's very difficult to say  
21 how much time is devoted to these duties. And I know there  
22 was a whole diatribe, I guess, on how much is mental and how  
23 much is actually spent doing this, but I can tell you, as a  
24 nurse, when I worked as a nurse, most of my time, even  
25 though I was delivering patient care, I always thought about  
26 the safety of the patients. If the family came in and

1 wanted to know what's going on, I had to address those  
2 issues. I didn't say, "Go to the supervisor and find out."  
3 I myself had to do that. So, I really think that this is a  
4 dangerous area to go into, especially for healthcare.

5 I really ask that you take a careful look at this  
6 proposed exemption. I know the healthcare industry  
7 employers have been looking for ways to exempt nurses,  
8 especially, from the payment of overtime, and I find this  
9 proposal, along with the proposal that was taken off the  
10 table, as certainly an avenue for the healthcare industry to  
11 start looking again at, "Oh, good, another way to get out of  
12 paying overtime." And we, as professional nurses and all  
13 healthcare employees, deserve to be paid overtime for  
14 delivering the care to some of you, if you're patients, and  
15 your families.

16 We worked very hard to get AB 60 passed to protect  
17 the working men and women of California. And it just seems  
18 to us that at every opportunity possible, efforts are being  
19 made to avoid the intent of the law. So, again, we ask you  
20 to look at not making changes in this proposal and the  
21 proposal that you postponed a decision today.

22 Thank you.

23 (Applause)

24 MS. GARCIA: (Through Interpreter) Good morning.  
25 My name is Rosalina Garcia. I work for the Sutter Company.

26 We're suing the company because they didn't

1 provide us lunch breaks or rest breaks.

2           We already have a tremendous workload. And with  
3 this idea of taking away the right to overtime, if we had to  
4 fill in for other people, then we have an even higher  
5 increased workload and we wouldn't get paid.

6           But these are some papers from the lawsuits we  
7 filed on the company.

8           It's hard enough for us, as parents, to be able to  
9 provide for our children with the wages that we earn, to pay  
10 bills and utilities and rent and so forth --

11           -- such as if our children don't have the right to  
12 enjoy themselves.

13           The main question, as Art was saying, it would be  
14 crazy to say that a janitor is a manager --

15           -- because a new worker comes into the building  
16 and you tell them how to tie the garbage bags so that they  
17 can throw out the garbage --

18           (Laughter)

19           -- or because I have to think about whether or not  
20 there are enough garbage bags to take out the trash for the  
21 rest of the week.

22           Then we'd all be managers.

23           And the owner would take that excuse to classify  
24 all of us as managers --

25           -- and make us work more hours for the same low  
26 wage.

1                   That's all for right now.

2                   (Applause)

3                   MR. McKINNON: My name is Matt McKinnon, and it's  
4 my honor to represent the machinists union members of the  
5 State of California here at this hearing today.

6                   I have to -- I have to tell you that the  
7 machinists union represents workers in aircraft maintenance,  
8 aircraft repair, making airplanes, making defense planes,  
9 missiles, rockets, electronics, forest products. We  
10 maintain the trucks on the road, we maintain the railroads,  
11 we maintain the longshore offloading equipment. If there's  
12 anybody that fixes something or makes something or  
13 manufactures something, it's likely you're going to run into  
14 a manufacturing unionist and, in California, very often  
15 that'll be a machinist.

16                  And I really -- I really have to tell you that as  
17 I look at this proposal, I have to tell you that if my  
18 members out in the rank and file and out in the shops that  
19 use their brains and their hands together -- they're often  
20 supervised by people who don't know how to do the skilled  
21 work -- if they found out for a moment that their craft and  
22 that their skill and that their thinking were something that  
23 someone was going to leverage to take away their overtime  
24 pay, they would go crazy.

25                  And I think that there has to be an understanding  
26 here of how much anger that this kind of proposal has

1 brought. I've been trying to calm people down over these  
2 last -- the proposal you dropped earlier today, 90 percent  
3 of our members get stock and bonuses and incentives. I  
4 mean, we half own United Airlines -- come on -- Boeing, and  
5 all of our members make more than two times the minimum  
6 wage. So, we are affected by this.

7           Clearly, when the Wilson administration's IWC  
8 tried to unravel the eight-hour day, and successfully did,  
9 in 31 places in California employers came to the bargaining  
10 table to try to take the eight-hour day away from our  
11 members, 31 places. So, I think it's really, really  
12 important for this Commission to understand that when you  
13 make industrial policy in this state, even if people will  
14 argue, "Well, it doesn't affect union members," it does, and  
15 it affects collective bargaining, and it affects things like  
16 labor peace, and it affects things like how we think about  
17 doing manufacturing in this state.

18           And part of the motion of what we need to be doing  
19 in manufacturing in this state is having workers involved  
20 more and more and more in making the decisions on how to  
21 move manufacturing, how to make it happen. We're doing lean  
22 manufacturing, we're doing high-performance work  
23 organizations, we're doing stock incentives, we're doing all  
24 sorts of things to make companies work more efficiently.  
25 You cannot play with people's overtime pay while that's  
26 going on. You can't do it.

1                   And frankly, if we let Burger King be the  
2   determiner of what our industrial policy in this state is,  
3   we're in deep, deep trouble.

4                   (Applause)

5                   MR. McKINNON: I could go through, and I would be  
6   happy, as you're working on this, to go through point by  
7   point, but there are tens of thousands of workers that do  
8   nothing but work on the control of flow of materials that  
9   are being manufactured. They're not managerial; they're  
10  workers. They're people that plan things. You would not  
11  want one of our United Airlines mechanics to give up his  
12  emergency repair duties to somebody that didn't get paid  
13  overtime because they were salaried managerial. You  
14  wouldn't want that to happen. You wouldn't want a tool-and-  
15  die maker to not think and plan and figure out how to do  
16  something. His boss doesn't know how to do it.

17                  Anyway, I'm pushing my luck with time, I'm sure.

18                  COMMISSIONER DOMBROWSKI: I'm sorry. I just --  
19  we're going to lose Commissioner Coleman, and I want to make  
20  sure we do get to some of these other items because we need  
21  her vote on them.

22                  MR. McKINNON: Well, on behalf of the machinists  
23  union, thank you for your time. And please, take this thing  
24  back and really work on it. It should have never even got  
25  out here.

26                  (Applause)

1 COMMISSIONER BROAD: Mr. Chairman? Mr. Chairman?

2 COMMISSIONER DOMBROWSKI: Yes.

3 COMMISSIONER BROAD: I'm wondering, if  
4 Commissioner Coleman has to leave, maybe we should take sort  
5 of a hiatus and do the business that we need to do before  
6 she leaves.

7 COMMISSIONER DOMBROWSKI: One?

8 COMMISSIONER BROAD: You have till one? Okay.  
9 All right.

10 COMMISSIONER DOMBROWSKI: We have till one. I  
11 just want to make sure we get this by one.

12 MR. PULASKI: What do we do? Are we to go?

13 MR. LAGDEN: I'm Keith Lagden. I'm a former  
14 manager of Taco Bell and Wendy's. I'm part of a -- well,  
15 I'm actually one of the representatives of a class action  
16 against one of the fast-food companies.

17 It's been very interesting listening to the  
18 arguments here this morning. And the overtime rule has  
19 really been an eye-opener for me, because suddenly, with  
20 Taco Bell, it was compulsory to work 50 hours. And the only  
21 way to get paid was to put your hours into the computer, as  
22 you would do with the rest of staff. However, being a  
23 general manager, as I was called, I would enter the 50 hours  
24 that I worked in that week, or more, and the computer would  
25 simply throw it back out, that I was only allowed to put 40  
26 hours in. So, I had to work 50 hours, register 40, to be



1 paid.

2 If, however, I omitted to put in the 40 hours and  
3 only put in 32, I would only be paid for 32. And in my  
4 simple brain, I thought, "Well, you know, maybe I'm just  
5 hourly paid, but the other ten hours, I give away for free."

6 Commissioner Broad, I thought, was rather amusing  
7 this morning, because I'm sure that he's spent some time  
8 working in fast food, particularly with the amount of  
9 thinking time that's done. And he's absolutely right.

10 (Applause)

11 MR. LAGDEN: You know, whether you're trying to  
12 stuff a taco with meat or whether you're trying to flip a  
13 burger, and you look around and you think, "There's 37  
14 people standing in line there, and they want fed." There's  
15 enough people there to see that the job is done. You can't  
16 control the line unless you stop the people coming into the  
17 store.

18 But there's a big difference between managerial  
19 thinking and physical management. And I think that this  
20 needs to be sort of clarified, the thinking managerial and  
21 the physical managerial. In my time as a general manager in  
22 both Wendy's and Taco Bell, my physical managerial time was  
23 less than 20 percent. The 80 percent of the time was  
24 flipping burgers, stuffing tacos, burritos, you name it,  
25 putting your head out the drive-through window, thanking  
26 everybody for coming by, taking the money out of the drive-

1 through at the back, or thanking the customers for coming  
2 in.

3           The lawyers that were up here this morning made a  
4 big deal about customer satisfaction. They obviously have  
5 never worked fast food. I doubt if they've ever done  
6 anything other than sit behind a desk in a law office. But  
7 what they don't understand is that everybody who works in a  
8 fast-food establishment is responsible for customer  
9 satisfaction, because if there's no satisfaction, there's no  
10 job for them. They need the satisfaction.

11           And as this gentleman here said, you know, when he  
12 was 16, he had to make a management decision: did he wipe  
13 up the ketchup or did the company get an action against  
14 them? It's the same with the 16-year-old kid or the 35-  
15 year-old person that's working in fast food. Is it a  
16 management decision? No, it's a commonsense decision, not  
17 management.

18           The training of people is strictly laid out in  
19 fast-food companies. It's done by books. There's a book  
20 which comes, thicker than that, and in Taco Bell it's called  
21 "The Answer Book." And if you want to know the answer, you  
22 look in the book. It tells you how to make beans, it tells  
23 you how to cook meat, it tells you how to stuff a taco, it  
24 tells you how to clean the bathroom, it tells you how to  
25 clean the pan, and it tells you how to shut the door and set  
26 the burglar alarm. It's all in the book. Everybody in the

1 store reads it, so everybody needs to know.

2           The training is done on what they call cascade  
3 fashion. I start -- it's my first job in Taco Bell, and my  
4 job is just to clean the floor. Somebody else gets hired, I  
5 get promoted. So, I show the next person down the line that  
6 comes in how to clean the floor. I don't need to be a  
7 manager to do that, but is it a management decision to show  
8 somebody how to clean the floor? Scrub it this way one week  
9 and that way the next week. That's how it's done, and it  
10 isn't a management decision; it's a commonsense -- really, a  
11 commonsense decision.

12           I think the -- if the law goes ahead creating  
13 management positions, for fast food, everybody will be a  
14 manager. You're going to go into a Burger King, a Taco  
15 Bell, a Wendy's -- you name it. It's going to have a  
16 staffing of 42 managers if the store does about \$1.25  
17 million a year. Everybody will be a manager. Everybody  
18 will think managerially, and that'll be fine. But they will  
19 all be managers because they all have to think. They all  
20 have to try and give the customer that little bit more.

21           Trying to decide whether we're management or  
22 whether we're crew, that's very difficult when we're told,  
23 "These are the uniforms you're going to wear," and you're  
24 going to look the same as the guy that's handing the food  
25 out the window, the guy that's flipping the burger, the guy  
26 that's stuffing burritos, chopping the lettuce, sweeping the

1 floor, wiping the tables, emptying the trash. You all have  
2 the same uniform; you just have a little different badge.

3           The other thing that I do want to make really  
4 known to you is that there is a class action with -- against  
5 Pepsi Cola and Taco Bell. The class action was raised in  
6 1996. Immediately it became known, Pepsi Cola hired off the  
7 fast-food business to a company called Tricon. It's still  
8 controlled by Pepsi Cola, but on the stock market it's a  
9 different entity. The reason for that is, is that should  
10 the class action be successful and there's a run on the  
11 stock, it will be less harmful to Pepsi Cola than it will be  
12 to Tricon. That tells you how much money that they're  
13 prepared to put up to make sure that they do, in fact, get  
14 everybody with no overtime. That's what they're really  
15 looking for.

16           I have stock options from Wendy's, and, quite  
17 frankly, they're not worth the paper they're printed on.  
18 Just like my friend said, they give them to you at the  
19 highest value of the year. Had I have bought them, I'd have  
20 been better just giving the money to the Salvation Army.  
21 Really, they're half the value of what the stock is or what  
22 the options are, so they're not worth having. I would need  
23 to go probably for another four years before they would make  
24 anything or even break even.

25           And that really is about as much as I have to say,  
26 from the fast-food industry.

1 Thank you, and I thank you for your time.

2 COMMISSIONER DOMBROWSKI: Thank you.

3 (Applause)

4 MR. GETZ: Hello. My name is John Getz. I work  
5 in the food industry. I work for Albertson's. I've worked  
6 there for 17 years now. I've held a number of different  
7 positions, from over ten years in management to -- actually,  
8 I started from the bottom, worked my way up, and worked my  
9 way back down again. I'm now a grocery clerk.

10 I've had the opportunity to work for companies  
11 like Super K -- I've worked both nonunion and union retail.

12 Really, what I am here is I'm a father. I have a  
13 2-year-old, I have a 4-year-old, married, trying to buy a  
14 home in Orange County. I depend on my overtime to make my  
15 bills. And that's -- that's it in a nutshell. I have to --  
16 I don't make -- I make just barely enough to afford a home,  
17 put clothes on my kids' back. I count on that money.

18 What you're proposing to do here is use a broad  
19 brush. I've been in this industry for 17 years. We provide  
20 service, and we provide a product. That just about covers  
21 everything that we've talked about today. Everybody in my  
22 store would be a manager.

23 If you go around -- we're heavy on titles. We  
24 have -- it's numeric. We have a manager, from 1 to 6.  
25 Those are store managers. We have two front-end  
26 supervisors. We have a deli department and assistant

1 manager there, a bakery department manager and assistant  
2 manager, a meat manager and assistant manager, a produce  
3 manager, so on and so on and so on and so on. We've got  
4 more chiefs than we do Indians, just be title alone.  
5 Everybody in my store could be classified as a manager under  
6 the language that we're using here today.

7           My wife was a -- she left the bargaining unit and  
8 went into a management position, administrative position.  
9 This practice goes on today, even now, in the food industry.  
10 They got her to a point where, when we had children, the  
11 employer changed the rules of the game and told her that she  
12 had -- she was mandatory, had to be in a store to manage her  
13 store, for ten hours a day, five days a week. If she did  
14 not cut the numbers they needed to do, she needed to be  
15 there another extra day. That's a salary employee. What  
16 you're proposing is, they could make everybody -- all my co-  
17 workers, myself, everybody included, a salary employee.

18           If you really think that the employer will define  
19 this and not exploit the working class people in our state,  
20 that's -- if they see an opportunity to do that, they will.  
21 And what we're talking about here is making it legal.

22           They told me to keep it brief, so thank you very  
23 much for your time.

24           (Applause)

25           MR. KITTREDGE: Hello. Good afternoon,  
26 commissioners. I'm in the same industry as John is. I'm in

1 the retail food industry. I've been a 20-year employee of  
2 Ralph's.

3 I'm rank and file, on the front line. I've held  
4 many different positions and wore many different hats, such  
5 as a frozen food manager. I was the only person in the  
6 whole department. I did the order. That was it. I had  
7 nobody that I managed.

8 As I heard -- I believe his name was Mr. Laidlaw  
9 speak this morning, I doubt that he ever worked in this  
10 industry because of some of the things that he said. I'm  
11 sure that he thought he was narrowing the definition of  
12 overtime, but I think that he was expanding it to include  
13 almost every single person that works in my store.

14 When I was younger, overtime pay helped pay for  
15 the extra stuff I needed to get for my growing kids. Today  
16 my kids have their own kids, and overtime laws allow me to  
17 have the time to give back to my community, to be a  
18 volunteer on boards and committees.

19 Contrary again to what Mr. Laidlaw said, you would  
20 be opening the floodgates of abuses that would follow this  
21 type of change in the overtime law.

22 I think California today is probably economically  
23 bigger than a lot of the Third World countries. I think  
24 that it's time that the employers in California share some  
25 of the phenomenal economic growth that we're having. And by  
26 not passing this measure, you will not create additional

1 hardships on working families in California.

2 Thank you.

3 (Applause)

4 MR. POWELL: Mr. Chairman, members of the  
5 Commission, my name is Edward Powell. And in addition to  
6 the title that Art Pulaski gave me, I'm also the senior vice  
7 president for the International Alliance of Theatrical Stage  
8 Employees, and we have over 40,000 people working in the  
9 entertainment and motion picture industry in this state.

10 The issue before us today is one that we have had  
11 before us many, many times. As a matter of fact, I have  
12 argued in front of the Industrial Welfare Commission in the  
13 past against employers that would take overtime and take  
14 minimum wage away on the basis that they had special  
15 interests, in terms of trying to put young people through  
16 college or anything else that they could dream up at the  
17 time.

18 The fact is that the Industrial Welfare Commission  
19 was formed in 1913 to protect the interests of working  
20 people of this state, not to give in to the greed of the  
21 employers. And it seems like we are constantly fighting the  
22 battle with the employers to take more and more away from  
23 the lower income people so that chairmen, like the Bank of  
24 America chairman that just retired, can get a \$50-million  
25 bonus at the expense of the little people that work under  
26 his position.



1           I believe that the time has come when we have to  
2 take a look at what's best for the people, because the  
3 people are what make this state work. We're the fifth  
4 largest economy in the world, and we're the fifth largest  
5 economy of the world because we have a workforce that puts  
6 everything that they have into making this state what it is.

7           The people that I represent all work with their  
8 minds. They all make decisions that could be construed by  
9 the other side as being managerial. It's important that  
10 everyone take a position to think like a manager in order to  
11 do their job better, because the product that we deliver to  
12 the American people is a product that has to be perfect. If  
13 you see a product on the screen or you see a stage play, you  
14 don't want to see mistakes, you don't want to see miscues,  
15 you don't want to see bad dialogue or bad lighting or bad  
16 photography. You want to see a perfect production because  
17 that's what you paid for.

18           So, I believe that the position that the employers  
19 are taking relative to this management position, which I  
20 still find it very, very difficult to understand, is wrong.

21           One of the speakers had mentioned a couple of  
22 points which I wrote down because I couldn't quite fathom  
23 what he was trying to say. But one was that mental work is  
24 an integral part of management duties. Well, I would say  
25 that that fits into just about any category that we would --  
26 that we would work under. And secondly, in rebuttal to

1 Commissioner Broad, he was saying that there's a rebuttable  
2 presumption that a certain law can be changed. But when I  
3 add those two up, I can always come to the reality that he  
4 spoke of, that the bottom line is to get as much from the  
5 little person as you can to satisfy the people up on top.  
6 And I think now is the time for you to take action, in my  
7 opinion. Drop this like a hot rock and go on and represent  
8 the people of this state in a better fashion.

9 Thank you very much.

10 (Applause)

11 COMMISSIONER DOMBROWSKI: Art, we're over 50  
12 minutes here, and I do have some other people who want to  
13 come up and testify in opposition, I believe, so could we --

14 MR. PULASKI: We'll ask each one just to be very,  
15 very brief.

16 COMMISSIONER DOMBROWSKI: Thank you.

17 MR. PULASKI: Uwe, please go ahead.

18 MR. GUNNERSON: Yeah. My name is Uwe Gunnerson,  
19 and I'm a member of the Operating Engineers Union Local  
20 Number 3.

21 Let me tell you that God cursed operating  
22 engineers. They only work nine months out of the year  
23 because God makes it rain for three months. And he makes it  
24 rain for three months so that they can atone for the sins of  
25 the people who write proposals like the one that we are  
26 discussing right now.

1 (Laughter and applause)

2 MR. GUNNERSON: Operating engineers do indeed and  
3 must at all times work with head and hand, to have a safe  
4 workplace, to apply skills that you do not learn from a  
5 book, that you learn from your seniors who are experienced.  
6 That's how you acquire your skills and that's how you become  
7 valuable to the employer. And that's how you make sure that  
8 your head is not in your hands.

9 (Applause)

10 MR. GUNNERSON: My grandfather used to have a  
11 beautifully well-drawn hunting dog, a beautiful animal, just  
12 like this article, Item 4 there. He shot the damn animal.

13 (Laughter)

14 MR. GUNNERSON: It was no good. It wouldn't hunt.  
15 Let me tell you, if my grandfather were around, he would  
16 shoot Item Number 4 too.

17 Thank you.

18 (Applause)

19 MR. GUNNERSON: Any operating engineers joining me  
20 here?

21 (Applause and cheering)

22 MS. PEREZ: Mr. Chairman and fellow commissioners,  
23 my name is Judy Perez. I'm with the Communication Workers  
24 of America, Local 9400. I live in San Bernardino County.

25 Communication Workers of America represents over  
26 50,000 workers in the State of California. We represent

1 hospital workers, university workers, teachers, printers,  
2 broadcasters, and the major telecommunications corporations,  
3 also the Indian casino workers amongst them.

4 I'll only briefly discuss one of our employers,  
5 and that is the telephone corporations, GTE, Pac Bell, and  
6 AT&T. We have titles such as service assistants, marketing  
7 reps, service reps, head seniors, to name a few. The ones  
8 that you as commissioners would be most familiar with would  
9 be the telephone operator. Telephone operators and  
10 installers, as a condition of their employment, as any other  
11 employee of the telephone corporations, must sign an  
12 agreement saying they will ensure customer satisfaction, not  
13 50 percent of the time, but 100 percent of the time.

14 It would give me great pleasure to go to Pacific  
15 Bell and GTE and AT&T and let them know that our 50,000  
16 employees are now in management and should get about four or  
17 five times more of what they're currently making.

18 It would be more of a shock to go to our  
19 installers, who are worked 70 hours, forced hours, every  
20 week, and tell them they will no longer get paid for that  
21 overtime because they are considered managers.

22 You had a speaker earlier who spoke for the  
23 proposal, and he kept using the word "reality." And I would  
24 just like to tell you, in reality, this proposal is an  
25 insult to the working men and women of the State of  
26 California.

1 (Applause)

2 COMMISSIONER DOMBROWSKI: Thank you.

3 MR. HUNTER: Hi. My name is Keith Hunter. I'm  
4 here on behalf of the District Council of Ironworkers.  
5 Ironworkers are the men and women of California who build  
6 your bridges and your overpasses and put the iron in your  
7 high-rises.

8 I'm going to be brief. I just want to put on the  
9 record that the ironworkers are opposed to this proposal.

10 Thank you.

11 COMMISSIONER DOMBROWSKI: Thank you.

12 (Applause)

13 COMMISSIONER DOMBROWSKI: Briefly, please,  
14 identify yourself, affiliation, position.

15 MR. KOSNIK: My name is Bill Kosnik. I'm a  
16 restaurant manager with Carrow's. I've worked for Carrow's,  
17 Baker's Square, Chevy's, and Lyons for the last ten years.  
18 And I've never received a minute of overpay. And from -- I  
19 never even knew what exempt and non-exempt meant until the  
20 last year.

21 All my employees, when a Coke spills or a bottle  
22 of ketchup, they all know that it's their job to pick it up.  
23 Also, all day long, we put away the truck, we wait tables,  
24 we serve, we take cash, we get drinks, and we all take care  
25 of the customers the same. And I've been doing this for  
26 about ten years.

1           And my wife's a restaurant manager also, and we  
2   have two small children. And we barely see each other or  
3   the kids. And we work between 55 and 65 hours each a week.

4           So, that's all I'd like to say. Thanks.

5           COMMISSIONER DOMBROWSKI: Thank you.

6           (Applause)

7           COMMISSIONER BROAD: I have a question.

8           COMMISSIONER DOMBROWSKI: Real quick.

9           COMMISSIONER BROAD: I'd like to ask him a  
10   question.

11          Excuse me, sir.

12          COMMISSIONER DOMBROWSKI: He's walking away.

13          COMMISSIONER BROAD: Do you spend a significant  
14   amount of your time doing the same work as your  
15   subordinates? Do you pour coffee, do you run the cash  
16   register? What do you do?

17          MR. KOSNIK: All day long, with different  
18   companies it was different things. The training is  
19   basically the same. You're on the cook line cooking for  
20   two, three hours, you know, burning yourself. You're not  
21   thinking about anything manager when you're working a 360-  
22   degree fryer or using a knife to cut a sandwich, you know.  
23   I've got plenty of cuts to show for it.

24          It's, you know, prepping. You know, we spend two  
25   or three hours prepping every day.

26          And I heard somebody else say that worked for

1 Wendy's, you know, if your food cost or labor is high, you  
2 work a sixth day. And to bring it down, how do you bring  
3 down your labor? You actually do an hourly job.

4 COMMISSIONER BROAD: Well, let me ask you this  
5 question. Does the company tell you to think about  
6 managerial things while you're doing these other duties? I  
7 mean --

8 MR. KOSNIK: You know, when I was in training --  
9 and my wife's a trainer for Carrow's right now -- and they  
10 never once tell you, "Okay, now while you're cutting a  
11 sandwich, make sure you're thinking about your P&L," or  
12 "Make sure you make your 3 percent sales commitment." You  
13 know, that's in the back of your head, because if you don't  
14 get that, you have a chance of losing your job, you know.  
15 Basically, in order to hit your goals, you have to do the  
16 hourly job. I've cleaned bathrooms, I've, you know, fixed  
17 plumbing, you know, I've done everything so as not to hire  
18 somebody else, because I have a chance of losing my job  
19 because my numbers are not in line, you know. And I've been  
20 doing this for ten years.

21 COMMISSIONER BROAD: So, maybe the thought that's  
22 going through your mind while you're doing those other jobs  
23 is, roughly, sort of anxiety? That would be --

24 MR. KOSNIK: Right, right, right. Exactly. Or,  
25 you know, kissing my kids at nine o'clock at night when  
26 you're walking through the door and they're already asleep,

1 you know, and leaving at 4:30 in the morning, you know, to  
2 go to work, you know, or working the sixth or seventh day,  
3 whatever. I've put in 35 days in a row times, and I've  
4 never seen a minute of overtime. I never knew what exempt  
5 or non-exempt was until a year ago. And then, when I talked  
6 to -- I've managed fifteen different restaurants in the Bay  
7 Area. I've managed over 55 managers, and we all do the same  
8 thing.

9           You know, the busboy, if he sees the ketchup drop  
10 on the ground, he's going to pick it up. I don't have to  
11 tell -- stop cooking to tell him to get the ketchup or to  
12 clean up the Coke, you know, on the floor. You know, we all  
13 do the same job. It's just that I'm titled kitchen manager  
14 or general manager, assistant manager.

15           So --

16           MR. PULASKI: Thank you.

17           COMMISSIONER BROAD: Thank you.

18           MR. PULASKI: Mr. Chairman, we have one final  
19 brief comment from Ken Lindeman, and then we'll end.

20           COMMISSIONER DOMBROWSKI: Thank you.

21           MR. LINDEMAN: Yes. My name's Ken Lindeman, and I  
22 also was with Wendy's and Taco Bell for fifteen years as a  
23 general manager.

24           And I concur with what the last gentleman said,  
25 and with Mr. Lagden, who was also with Wendy's and Taco  
26 Bell.



1 I would say at least 80 percent of my time was  
2 based on production work, meaning cutting tomatoes, onions,  
3 flipping burgers, making tacos, stocking shelves, or working  
4 the drive-through. Believe me, when you're stuck on that  
5 drive-through, you're not thinking anything else but that  
6 drive-through. You're not concerned about your P&L or  
7 scheduling or anything else.

8 I just want to say that some of the proposed  
9 duties, like the last gentlemen said, are not managerial.  
10 Customer relations, that's everybody's responsibility in the  
11 store. Customer complaints, you know, unless you have  
12 somebody very, very belligerent, anybody could take care of  
13 that. And training is also -- it's done on the crew level  
14 too. The crew do most of the training.

15 And I just wanted to say that, average, I spent 60  
16 hours a week, sometimes 70. I did work 30 days straight at  
17 one time, have not seen any overtime, responsible for a one-  
18 to two-million-dollar store and amounted to about \$12.80 an  
19 hour, is what I made.

20 Thank you very much.

21 COMMISSIONER DOMBROWSKI: Thank you.

22 (Applause)

23 MR. RANKIN: Thank you.

24 In conclusion, the statute required you to review  
25 management duties. You've done your duty. Drop it. Don't  
26 bring it back.

1 (Applause)

2 COMMISSIONER DOMBROWSKI: John Bennett.

3 John Bennett, I believe?

4 MR. BENNETT: That's correct.

5 I was going to say good morning, but I will now  
6 say good afternoon. I want to introduce myself. From 1978  
7 to 1984, I was a management representative on the Industrial  
8 Welfare Commission. And for the last two years of that  
9 period, I was the chairman.

10 Since January 1, I am now happily retired, and I  
11 am not here today representing anybody, any organization, or  
12 anybody except myself.

13 Most of my adult life, I have been concerned with  
14 protective labor legislation, both from the standpoint of a  
15 corporate human resources and labor relations executive and  
16 also as an attorney specializing in employment and labor  
17 law. Most significantly, for ten years I worked for  
18 Montgomery Ward and Company, which was then -- may they rest  
19 in peace, I guess -- plagued with very serious compliance  
20 issues under the Fair Labor Standards Act and under other  
21 corresponding state laws. I finally wound up writing an  
22 internal manual on how to comply with the wage-hour law as a  
23 way of trying to relieve the pressure on the violations that  
24 kept seeming to be cropping up.

25 Later, for eleven years, I was the labor relations  
26 director for Crown Zellerbach, a -- once again, formerly a

1 major corporation in the Bay Area, and most recently, a vice  
2 president of human resources for another paper manufacturer  
3 with 2,500 employees and about a billion dollars in -- a  
4 billion dollars in revenues.

5 COMMISSIONER DOMBROWSKI: Mr. Bennett? Mr.  
6 Bennett?

7 MR. BENNETT: Yes.

8 COMMISSIONER DOMBROWSKI: Could you just -- we'll  
9 acknowledge your résumé if you could just go to the heart of  
10 your comments, please.

11 MR. BENNETT: Yeah. I'm here today to say that  
12 despite my orientation toward management, I think that the  
13 proposals that have been made here are wrong and faulty and  
14 should not be adopted.

15 (Applause)

16 MR. BENNETT: It's a new one on me to be applauded  
17 by labor people.

18 (Laughter)

19 MR. BENNETT: First of all, the language proposed  
20 unduly broadens the definition of exempt employees, who are,  
21 in reality, in no way executives. These people should  
22 enjoy, I think, the protections afforded by the wage and  
23 hour laws that exist today.

24 Secondly, the proposed redefinition of exempt  
25 work, I think, directly contradicts the terms of AB 60, and  
26 if enacted by the IWC will almost certainly result in

1 litigation in court, and probably a return to the limbo from  
2 which the IWC most recently emerged.

3           Let me comment on the first one. I think what  
4 you've heard today is very typical. It is particularly true  
5 in the retail and service industries that first-line  
6 supervisors have to spend some percentage of their time  
7 doing the same work as their subordinates, waiting on  
8 customers, working the cash register, stocking shelves,  
9 doing the same kind of work. And depending on the size of  
10 the department, it might be 5 percent of the time and it  
11 might be 95 percent of the time. If you're the manager of  
12 an auto service unit with one tire-buster and a mechanic  
13 plus you, it's going to be 95 percent of the time. And if,  
14 on the other hand, you have a dozen mechanics working for  
15 you, you're going to be supervising them 95 percent of the  
16 time.

17           Because of the enormous competitive pressures that  
18 are put on retail and service industries, there is a  
19 terrific economic pressure on employers in this state to  
20 find a way to exempt more people from overtime. One of the  
21 ways under current law that this is done is to try to  
22 characterize non-exempt work as exempt work. For example, a  
23 department manager who makes a sale when no salesperson is  
24 available can be said to be doing emergency work or to be  
25 providing customer satisfaction, because the customer won't  
26 be satisfied if they don't get waited on. Sweeping the

1 floor could be characterized as ensuring the safety of  
2 employees and customers.

3 In one case I am familiar with, I heard it argued  
4 that a manager of a retail establishment who cleaned the  
5 toilet was performing exempt work because, in doing so, he  
6 was supposed to be setting a good example for other  
7 employees. Now, understand, I'm not knocking these  
8 arguments, because, as a management representative, I used  
9 to make a lot of them myself. However, now that I'm retired  
10 and not being paid, I can tell it like it is.

11 (Laughter and applause)

12 MR. BENNETT: So, the intent is --

13 COMMISSIONER DOMBROWSKI: We are on a schedule,  
14 though, please.

15 COMMISSIONER BROAD: I think we should -- Mr.  
16 Chairman, I think we should afford the witnesses as much  
17 time as they need. And if the proponents would like to come  
18 back up and talk some more, we should let them do that too.

19 COMMISSIONER DOMBROWSKI: I would just -- how long  
20 do you think you're going to need? Because we do need to  
21 get some other -- I'll put this on hold and you can speak  
22 after we finish some other business if you're going to take  
23 a while.

24 MR. BENNETT: Three minutes.

25 COMMISSIONER DOMBROWSKI: Okay. Go ahead.

26 MR. BENNETT: What the proposal before the

1 Commission attempts to do is to get at the proposition that  
2 if you are a manager, by definition any work you do is  
3 managerial work. And this is explicit in the case of the  
4 proposal for an employee in charge of an independent or  
5 physically established branch. If you're in charge of that,  
6 then everything you do is presumed to be managerial because  
7 you're a manager.

8           And in a very complicated and difficult, broadly  
9 phrased language, that is the intent also of the  
10 redefinition of managerial work, which, in effect, seeks to  
11 redefine managerial work as including time-card work.

12           In terms of real people, what the Commission has  
13 to decide is whether people like the Taco Bell manager, for  
14 example, who was here previously, whether as a matter of  
15 policy that's someone who, under the laws of California,  
16 should receive overtime or not, if a -- working 60, 80  
17 percent of the time doing time-card work is typical. If it  
18 is the Commission's conclusion that this person should not  
19 receive overtime, then the clean and honest way to do it is  
20 to toss out the concept of exempt and nonexempt work  
21 altogether. Be clear about it. Be honest. And don't try  
22 to do it by way of the back door, because all that will do  
23 is throw the whole process into limbo. And only the  
24 attorneys, of which I used to be one, will benefit.

25           In closing, I should say that I fully understand  
26 and appreciate the competitive -- the enormous competitive

1 problems of retailers and service establishments today, and  
2 I'm fully aware of the fact that controlling labor costs is  
3 frequently the difference between profit and going out of  
4 business. I also believe that the majority of employers in  
5 this state are decent employers who want to do the right  
6 thing and who would be ill-served by adopting this very  
7 broad language that's been proposed. I think the only  
8 people who would benefit from this kind of language are the  
9 least ethical employers, whereas the great majority would  
10 actually suffer from what would be done here.

11 In conclusion -- and I hope I'm not over three  
12 minutes -- I want to -- well, I don't know whether to  
13 congratulate the members of the Commission on their  
14 appointment or to offer my condolences.

15 (Laughter)

16 MR. BENNETT: You will find, if you haven't  
17 already, that this will amount to a second job. The issues  
18 you are facing are very important, and they are also very  
19 tricky, difficult to understand, and the process is not made  
20 any easier by fast-talking smoothies or people who just make  
21 emotional appeals. So, I -- in way, I -- may you live in  
22 interesting times. You are living in it. And best of luck.

23 Thank you.

24 COMMISSIONER DOMBROWSKI: Thank you.

25 I'm going to go slightly out of order here and go  
26 to Item Number 8, the appointment of members to the wage

1 board for computer professionals, in accordance with Labor  
2 Code Section 1178.5(b) and 1179.

3 I believe Commissioner Coleman and Commissioner  
4 Broad have some names they want to suggest.

5 MR. RANKIN: (Not using microphone) Would you  
6 mind listening on this?

7 COMMISSIONER DOMBROWSKI: Go ahead, Tom.

8 MR. RANKIN: Tom Rankin, California Labor  
9 Federation.

10 I hope you're in receipt of a letter that we sent  
11 you recently on this whole issue. I just want to make the  
12 point again -- I tried to make it at your last meeting when  
13 you set up this wage board -- one, you have no statutory  
14 authority to set up -- to deal with this issue for hourly  
15 computer professionals, to try to exempt them. The statute  
16 does not give you that authority. The statutory sets out a  
17 salary in the statute. You're trying to play with that.  
18 You can't do it.

19 Two, even if you could do it, you have not  
20 followed your procedures for setting up a wage board. You  
21 have not ever publicly noticed a hearing on this issue. You  
22 may have heard a couple witnesses from management on it, but  
23 you never noticed a public hearing. You're setting up a  
24 wage board without following procedures.

25 Moreover, you have not indicated, specified which  
26 wage order these people are covered under. And I would



1 submit to you they're probably covered under many. And one  
2 wage board will not work legally -- just a note of warning.

3 (Applause)

4 COMMISSIONER BROAD: Mr. Chairman, can I raise  
5 that as a point of order? What is the intention here, to  
6 establish one wage board which is going to make a  
7 determination across every -- and then make recommendations  
8 that would go in every wage order?

9 MS. STRICKLIN: My understanding is that this was  
10 going to go initially into the interim order. That's what I  
11 understood the proposal was at the last hearing.

12 COMMISSIONER BROAD: And it's your opinion that  
13 that's lawful?

14 MS. STRICKLIN: Yes. There can be -- there are  
15 only computer programmers that are listed under 4. And I  
16 understood that the procedure that this Commission was to  
17 taking was to initially put everything into one order, which  
18 would then be branched out into the individual orders that  
19 they would particularly go into.

20 COMMISSIONER BROAD: And it's your understanding  
21 that that's lawful?

22 MS. STRICKLIN: My understanding is, yes, that  
23 that's lawful, that we are amending, under 517, the interim  
24 order, on all these various subjects, the stable employees,  
25 which was continued, the consideration of duties, the  
26 election procedures, and that they would eventually all be

1 put into their respective orders.

2 COMMISSIONER BROAD: Okay. For the record, it is  
3 my view that it's unlawful because, one, as Mr. Rankin  
4 pointed out, there has to be an investigation that includes  
5 a public hearing. There was no notice. And as you notice  
6 -- or as we received testimony, it was only after we voted  
7 to appoint a wage board that people in opposition had any  
8 opportunity, so we had no opportunity to consider their  
9 testimony, for example, that gentleman that came today.  
10 That's point number one.

11 Point number two is the interim wage order is  
12 intended to implement the provisions of AB 60. There's  
13 nothing whatsoever in AB 60 that has any bearing on an  
14 exemption for computer professionals. That's a matter that  
15 goes forth in our normal process.

16 Therefore, I think what's being proposed here is  
17 unlawful. However, the majority has taken that view, and I  
18 guess we'll -- if somebody is aggrieved, they'll raise that  
19 matter in the courts.

20 MS. STRICKLIN: As you recall, at the last hearing  
21 we discussed whether it was appropriate at that time to call  
22 a wage board or whether or not more investigation needed to  
23 be made, and the Commission as a whole made that decision  
24 that there was sufficient investigation with the notices  
25 that were sent out in prior hearings and meetings that the  
26 Commission would be taking testimony under AB 60.

1           That decision having been made, this is where we  
2 are.

3           COMMISSIONER BROAD: I appreciate that. I just  
4 wanted to make that point of order for the record.

5           COMMISSIONER BOSCO: Mr. Chairman, I don't know if  
6 -- I don't know if -- okay.

7           As I understand it, the threshold for appointing a  
8 wage board is simply that the Commission has done an  
9 investigation and then moves forward to the wage board. The  
10 purpose of the wage board is to allow both sides, in effect,  
11 management and labor, the opportunity to hold hearings  
12 throughout the state and come back to the Commission with  
13 their recommendations, which I think would certainly give  
14 everyone an opportunity to speak, not only here, but  
15 throughout the state.

16           Am I correct that the only threshold for  
17 appointing a wage board is that we have conducted an  
18 investigation and that there is no further delineation of  
19 what an investigation consists of?

20           MS. STRICKLIN: You are correct, in that there's  
21 no case law that defines what the extent of an investigation  
22 has to be. But in order to appoint a wage board, there has  
23 to be, quote-unquote, "an investigation," and there has to  
24 be a finding by the Commission that a particular industry,  
25 trade, or occupation has certain -- may be affected  
26 prejudicially, their health or welfare. And that's under

1 1178.5.

2 MR. RANKIN: I'd just like to point out 1178, the  
3 last sentence --

4 COMMISSIONER DOMBROWSKI: Identify yourself.

5 MR. RANKIN: Tom Rankin, California Labor  
6 Federation -- which deals with the selection of wage boards.  
7 The last sentence of that, "Such investigation" -- which  
8 gives you the duty to investigate, and then, also, as a part  
9 of your investigation, you have to find that the -- in this  
10 case, the hours or condition of labor may be prejudicial to  
11 the health, morals, or welfare of the employees. I don't  
12 know how you could find out, without hearing from one single  
13 employee from that industry, just hearing from management.  
14 And the reason you didn't hear from those employees was the  
15 last sentence: "Such investigation shall include at least  
16 one public hearing."

17 Now, in -- as far as I know, if you have a hearing  
18 and it's not noticed, that does not constitute a public  
19 hearing on this issue. If you had public hearings on -- you  
20 know, anyone in the world could come in -- but you never  
21 noticed a public hearing for computer professionals.

22 COMMISSIONER DOMBROWSKI: Any other comments?

23 COMMISSIONER COLEMAN: I'd like to submit some  
24 names for consideration by the Commission for the -- for the  
25 wage board for computer professionals. The names are Jim  
26 Schneider, Don McLaurin, Spencer Karpf, Mary Ellen Weaver,

1 Julianne Broyles, and Duane Trombly.

2 COMMISSIONER DOMBROWSKI: Those are the  
3 employer --

4 COMMISSIONER COLEMAN: These are the employer  
5 representatives.

6 COMMISSIONER BROAD: That's five plus -- which one  
7 is the alternate?

8 COMMISSIONER COLEMAN: Duane Trombly would be the  
9 alternate.

10 COMMISSIONER BROAD: And I would like to propose,  
11 for --

12 (Pause)

13 COMMISSIONER DOMBROWSKI: There you go. There you  
14 go.

15 COMMISSIONER COLEMAN: Try again.

16 COMMISSIONER BROAD: Oh, now it --

17 COMMISSIONER DOMBROWSKI: Try it now.

18 COMMISSIONER BROAD: Somebody's getting sick of  
19 me.

20 Anyway, I'd like to propose, for labor, Jim  
21 Gordon, Bruce Hartford, Edward Powell, Andreas Ramos, Tom  
22 Rankin, and Dirk Van Nouhuys, who -- and the last, Mr. Van  
23 Nouhuys, would be the alternate.

24 COMMISSIONER BOSCO: Mr. Chairman, I would like to  
25 propose as chairperson of that wage board Carol Anne  
26 Vendrillo.

1 COMMISSIONER DOMBROWSKI: Very well.

2 COMMISSIONER COLEMAN: The charge for the wage  
3 board has been distributed to all the commissioners, the  
4 draft charge.

5 COMMISSIONER DOMBROWSKI: So, a motion to adopt  
6 the charge and the names.

7 Do I need to do it separately, or can I do it all  
8 as one, or -- do it all as one.

9 All in favor, say "aye."

10 (Chorus of "ayes")

11 COMMISSIONER DOMBROWSKI: All opposed?

12 (No response)

13 COMMISSIONER DOMBROWSKI: Thank you.

14 We'll go back to the agenda item, consideration of  
15 and public comment on convening a wage board regarding the  
16 minimum wage. And again, to maybe save some time on this,  
17 I, for one, am prepared to vote for that. I don't know  
18 about the other commissioners. I don't know if others want  
19 to come up and testify or if we can just go to the wage  
20 board for minimum wage.

21 MR. RANKIN: Tom Rankin, California Labor  
22 Federation. I think there may be a few people who came here  
23 to testify, one or two, on this issue. All I'd like to say,  
24 because I know you're pressed for time, is that it is time  
25 to act on this. The statute requires that you do it at  
26 least once every two years. Minimum-wage workers in

1 California have not seen an increase since Proposition 210  
2 was passed in 1996, and it's high time to bring that wage up  
3 to a living wage in California.

4 COMMISSIONER BOSCO: Mr. Chairman, may I make one  
5 comment to Mr. Rankin?

6 And I don't like doing this. Being a former  
7 member of the Legislature, I don't like to point out any  
8 inconsistencies in people's positions. However, I will note  
9 that you don't seem to be taking the same umbrage at us  
10 setting up a wage board for the minimum wage without  
11 having --

12 MR. RANKIN: You did have a hearing in Los  
13 Angeles. There were several hundred people there, I  
14 believe.

15 COMMISSIONER DOMBROWSKI: That was before  
16 Commissioner Bosco was appointed.

17 COMMISSIONER BOSCO: Okay. Thank you. Sorry.

18 AUDIENCE MEMBER: (Not using microphone) I think  
19 it was actually a noticed meeting.

20 MR. RANKIN: Yes. And it was noticed, also.

21 COMMISSIONER BOSCO: Okay. Thank you. That is  
22 true, it was before I was on the Commission.

23 MS. BRIDGES: Good afternoon, ladies and gentlemen  
24 of the Commission.

25 COMMISSIONER DOMBROWSKI: Use the microphone.

26 COMMISSIONER BROAD: Press the button.

1 MS. BRIDGES: Are we working?

2 COMMISSIONER DOMBROWSKI: There you go.

3 MS. BRIDGES: Okay. My name is Tracey Bridges,  
4 and I live in Sacramento. I'm a member of Acorn,  
5 Association for Community for Reform Now.

6 You're talking about minimum wage. \$5.75 isn't  
7 even enough for a family of four to live on, if you consider  
8 childcare, around \$400 a month, rent \$600 or more, utilities  
9 \$200 to \$300, groceries \$400 to \$500. You're talking about  
10 \$1,800 a month that a family should have to live on. They  
11 can't do it, not with a family of four.

12 A single mother who's on AFDC, who may have, say,  
13 on Child Action, who's paying part of her childcare bill,  
14 still cannot make ends meet on \$5.75 an hour.

15 (Coughs) Excuse me.

16 If you cut out the overtime that they are given,  
17 then that's the extra money that they might be able to  
18 barely make it by on.

19 There's grandparents who are raising their  
20 children. \$5.75 isn't enough, not when a movie, to take  
21 those children to, is \$6.00 a person. It cannot be done.

22 What about the medical bills? It can't be done.

23 Parents with children that have special needs,  
24 special education, that comes out of their pocket. \$5.75 is  
25 not enough to raise a child on and to give it a decent  
26 education, clothes, shoes. We need a higher minimum wage.



1 Thank you.

2 (Applause)

3 MS. BER: Hi. My name is Esperanza Ber, and I  
4 represent the garment union workers.

5 On behalf of my fellow members, I just came to  
6 tell you to please raise the minimum wage, because in the  
7 garment industry, we see a lot of, you know, work under -- I  
8 mean, the minimum wage. And it's hard to keep a family like  
9 this.

10 And that's it. I just want you to please think  
11 about it and ask to help our union members to raise the  
12 minimum wage.

13 COMMISSIONER DOMBROWSKI: Thank you.

14 (Applause)

15 COMMISSIONER DOMBROWSKI: I guess I'd like a  
16 motion.

17 COMMISSIONER BROAD: Yeah. Mr. Chairman, I'd like  
18 to make a motion that we, based on statutory requirements in  
19 the Labor Code, that we convene a wage board to consider  
20 whether it is appropriate at this time to increase the state  
21 minimum wage.

22 COMMISSIONER BOSCO: I second the motion.

23 COMMISSIONER DOMBROWSKI: All in favor?

24 (Chorus of "ayes")

25 COMMISSIONER DOMBROWSKI: All opposed?

26 (No response)

1 COMMISSIONER DOMBROWSKI: Motion passes.

2 Item 7, appointment of members to the wage board  
3 for construction, mining, drilling, and logging, as defined  
4 in interim wage order pursuant to Labor Code Section  
5 1178.5(b) and 1179.

6 Commissioner Broad, I believe you have those  
7 names.

8 COMMISSIONER BROAD: Do you want me to read all of  
9 them?

10 COMMISSIONER DOMBROWSKI: Yeah, go through all of  
11 them.

12 COMMISSIONER BROAD: Okay. For the employers,  
13 John Clarke, who will be the alternate, Ken Perry, Doug  
14 Ralston, Ron Rule, Charles Sloan, Scott Strawbridge, Mike  
15 Anderson, Frank A. Sanderson, David Charles Lefler, and  
16 Betty Walker.

17 And for labor, Nico Farraro will be the alternate,  
18 Cedric R. Porter, Dale Robbins, Gary Saunders, Gary Wagnon,  
19 Scott Wetch, Marie Box, Paul Cohen, Tom Rankin, Ronald E.  
20 Myers, Gunna Lundsberg, and Bill McGovern.

21 COMMISSIONER BOSCO: Mr. Chairman, I --

22 COMMISSIONER BROAD: Yeah, I'm done.

23 COMMISSIONER BOSCO: I nominate Daniel Altemus to  
24 be the chairperson of that wage board.

25 COMMISSIONER DOMBROWSKI: All right. I guess we  
26 have a motion.

1           COMMISSIONER BROAD: I'd like to move that we  
2 adopt those appointments to the wage board and that we  
3 approve the charge to the wage board.

4           COMMISSIONER BOSCO: Second.

5           COMMISSIONER DOMBROWSKI: Okay. All in favor, say  
6 "aye."

7           (Chorus of "ayes")

8           COMMISSIONER DOMBROWSKI: All right.

9           Any further business that may come up before the  
10 Commission? Does anyone wish to bring anything forward?

11           COMMISSIONER BROAD: Mr. Chairman, I -- perhaps  
12 you could also entertain -- I think the opponents (sic) of  
13 the earlier proposal had considerably more time than the  
14 opponents, as it turned out, and if there's any of them that  
15 would like to make further comments.

16           COMMISSIONER DOMBROWSKI: Okay. Okay.

17           Please identify yourself and your subject.

18           MR. AYAD: Good afternoon. Emil Ayad, Guard  
19 Vision Private Security. I'm here to speak about the  
20 concern of AB 60 towards the security guard industry.

21           The security guard industry is extremely,  
22 extremely affected by AB 60, especially over the eight-hour  
23 day, due to the fact it's very, very common for the security  
24 officers to work over eight hours a day. We are not against  
25 paying them the overtime, but, unfortunately, we don't get  
26 paid the overtime. Our clients, when they subcontract a

1 contract out to us, they do it for account. For example, we  
2 say, "We have 100 hours of security; give us a price." We  
3 quote them a price of, let's say, \$10, \$11 an hour. They  
4 don't care how many guys or how many people it will take to  
5 cover those hours; all they want is their location to be  
6 covered.

7           So, if we have a 24-hour location to be covered  
8 with security and the morning officer does not get relieved  
9 by the afternoon officer, he automatically kicks into  
10 overtime after eight hours. And a lot of these security  
11 officers have to work double jobs anyway to make enough  
12 living, because the security industry, the billing wage is  
13 not as high as we would like it to be. That's just the way  
14 the industry is.

15           What I would like to ask for today, to be exempt  
16 from over the eight-hour day, back to the 40.

17           Another problem we're having is this law right  
18 now, it was in effect before Pete Wilson came into office,  
19 and it was very easy for us to run the security industry  
20 because we had more manpower. But right now the  
21 unemployment rate is so low, it's down to 4 percent. And to  
22 get the manpower out of that 4 percent to work as a security  
23 officer, half of them have felonies, misdemeanors, and it's  
24 very hard to hire them if they have that kind of background,  
25 as security officers. So that would leave you just 2  
26 percent. And the Los Angeles area has over 2,000 security

1 companies that are trying to hire out of those 2 percent.

2 And it's very, very hard to operate a security  
3 company under the new AB 60, which is over the eight-hour  
4 day. It's very, very difficult. And what we're doing right  
5 now, in order to for us to cut back on the overtime because  
6 we don't get paid for overtime, is basically schedule the  
7 officers to work 32 hours a day -- I mean a week. So, that  
8 way, I have a lead of eight hours so I don't kick into the  
9 overtime.

10 We're not trying to get away from it. We'd like  
11 to comply with the law, but it's very, very difficult to  
12 operate under those circumstances.

13 I spoke to one of the senators about this back in  
14 November, and his response was, you know, "You should have  
15 thought about the business you were getting into." I was  
16 not expecting to hear that. I mean, we have our problem,  
17 we're looking for a solution where we can make it happen.

18 And another senator asked me, "Why are you the  
19 only one out of the security industry that's making a fuss  
20 about it?" Well, basically, a lot of self-employed people  
21 feel like, as employers, we have no rights. Maybe we don't.  
22 The employees have all the rights in the world. I was an  
23 employee at one time. I started off as a security guard and  
24 I worked my butt off to start my own business. I never came  
25 up here to cry about overtime or sued anyone.

26 It's becoming very, very difficult to operate in

1 California as an owner of a company. Insurances, taxes,  
2 city taxes, corporation taxes -- no one has a clue, unless  
3 you have your own business, how expensive it is to operate  
4 in California. It's not easy to operate in California any  
5 more, and that's why a lot of the big companies are leaving  
6 California, due to the fact that -- I mean, every city that  
7 I have a security officer, I have to pull a license to  
8 operate in that city. On top of that, I have to pay taxes  
9 in that city, okay? And it goes on and on and on. If I  
10 have a patrol unit go through a city in a vehicle, I have to  
11 pay taxes for the car going through the city. It's becoming  
12 very, very tough to operate.

13           And I'm here today because I do have faith in the  
14 system. Unfortunately, a lot of the security companies told  
15 me today that I'm wasting my time coming up here because  
16 they feel like it's a waste of time. Well, I don't feel  
17 like I'm wasting my time, because I'm fighting for something  
18 I believe in. And that's what it's all about.

19           I'm from another country. I'm not from here. And  
20 I have to admit, this is the greatest country in the world,  
21 because you come here, you can do something for yourself and  
22 your family. And I hear a lot of people up here today  
23 complaining about the overtime and all that. Well, you know  
24 what? As an employer, I'm going to find a way to cut down  
25 schedules and hire more people so I don't have to pay the  
26 overtime. You're going to have to go get another job anyway

1 somewhere else to make ends meet. You're going to work  
2 another 30 or 40 hours somewhere else, at straight time.

3           So, that's what I'm asking today, if we could look  
4 at it again. Again, I'm not against the idea of paying the  
5 overtime. But in the security industry, we bill straight  
6 time. Clients do not pay overtime. The only time they pay  
7 overtime is holidays. That's the only time. So, when they  
8 give out a contract -- the best example I can give you is,  
9 if you hire a contractor to build a room this size, and he  
10 gives you a bid for \$100,000, and he runs out of money, he's  
11 going to come back to you and say to you, "I paid my people  
12 overtime." You don't want to hear that. You paid for the  
13 project; you want it done. So, you either end up firing him  
14 or suing him.

15           So, please, if you could think about it. And it's  
16 for the security industry. A lot of security companies were  
17 not aware of this meeting today. Otherwise, they would have  
18 been here. I've been fighting this through last November.  
19 I wrote to Washington, I wrote to every senator, and I got  
20 very good response. I gave Andrew all the letters that I've  
21 received from the White House and the attorney general and  
22 the senators.

23           So, I ask of you, please reconsider to exempt  
24 security companies from the eight-hour days.

25           Thank you.

26           COMMISSIONER DOMBROWSKI: Any questions, comments?

1                   COMMISSIONER BROAD: Yes, sir. Just one question.  
2 Were you previously not paying people overtime after 40  
3 hours in a week?

4                   MR. AYAD: No, we were paying over 40 hours a week  
5 -- over 40 hours in a week.

6                   COMMISSIONER BROAD: Because that's been the rule  
7 under federal law since 1938. Nothing's changed, period, in  
8 that. It's always been the rule.

9                   MR. AYAD: No, we have been paying the overtime  
10 over 40 hours. But now we have to pay it over eight and ten  
11 or twelve hours a day. That's what's going to hurt us,  
12 because what happens is, when the officers --

13                  COMMISSIONER BROAD: Okay, I understand. I  
14 thought you were complaining that you had to pay overtime  
15 after 40, and I don't quite understand that.

16                  MR. AYAD: Oh, no. No, no. No, I'll clarify  
17 that. No, we -- I'm not against the idea of paying the  
18 overtime over 40, but over eight-hour days, for security  
19 companies, which -- security company is the largest -- or  
20 the fastest growing industry in California. It's the  
21 fastest growing. And I'm sure some of the companies that I  
22 know employ at least -- we're a small company; we have about  
23 350 employees, and that's a small company. Some of the  
24 bigger companies, they have 5,000, 10,000. I know one  
25 company that's got about 74,000 employees. And that  
26 overtime will basically either put them out of business or



1 leave the state.

2 COMMISSIONER DOMBROWSKI: Mr. Ayad, I'm going to  
3 ask Andy Baron, our executive director, to talk to you on  
4 the side about what kind of possible options you have within  
5 the context and help you out a little bit with that.

6 MR. AYAD: Okay. Thank you very much.

7 COMMISSIONER DOMBROWSKI: Thank you.

8 Anyone else want to bring something up?

9 MR. ULREICH: I don't want to swallow the  
10 microphone here. Is that about right?

11 COMMISSIONER DOMBROWSKI: Yes.

12 MR. ULREICH: I wasn't going to say anything  
13 today. My name is Bob Ulreich. But my reason for sitting  
14 down here and speaking briefly with you is the remarks made  
15 by the last speaker.

16 For twenty years, as a union official, as a  
17 representative and as a vice president, and then as a  
18 president of the International Union of Security Officers, I  
19 represented security officers. And I take the gravest  
20 possible exception to the remarks made by the last speaker.

21 If you take his remarks seriously, then I  
22 recommend that you have a two-pronged proposal as part of a  
23 complete program to disenfranchise security officers from  
24 the rest of the human race. The first part would consist of  
25 eliminating overtime after eight and double time after  
26 twelve. And then, as a second proposal, I suggest that you

1 see how you can eliminate the rights of the security  
2 officers to participate in the American democratic process.

3           They are very, very unable to defend themselves.  
4 Without a union, they are usually individuals at single  
5 sites on graveyard shifts. They are easily taken lightly,  
6 although sometimes their responsibilities include protecting  
7 \$100-million, \$200-million properties. And if this  
8 Commission doesn't act rightly, no matter what I'm doing in  
9 the future, I will come back here and be a spokesperson for  
10 that group, because having spent twenty years of my life  
11 representing them, I'm not going to see one individual who  
12 purports to speak for the entire security industry undo what  
13 has been done on behalf of my members.

14           I will also add that I have spoken to many, many  
15 executives in security companies who, contrary to what you  
16 have heard, believe that it is right for security officers  
17 to be paid overtime after eight hours, double time after  
18 twelve. Their concern is about having a level playing  
19 field. So, the way that you would be able to get them to  
20 agree with the position taken by the last speaker is if you  
21 said, "Well, small businesses won't have to abide by those  
22 standards," at which point they would say, "Hey, we have to  
23 compete with these guys, so why not give us the same rights  
24 and privileges?" because it is a very cutthroat -- everybody  
25 knows what I mean when I say "cutthroat"? -- it is a very  
26 cutthroat industry. Margins of profitability range between

1 one and three percent. And if you sow the wind, you will  
2 reap the whirlwind.

3 Thank you.

4 (Applause)

5 COMMISSIONER DOMBROWSKI: I have another  
6 housekeeping -- just a housekeeping note, for the record.  
7 We have letters from the Attorney General's Office and  
8 legislative counsel opinion concerning the stock option  
9 proposal that are on the public record. People who want  
10 copies of those can inquire at the IWC office.

11 Any other business?

12 Is that a "yes"? You want to -- okay.

13 MR. DELTE: Hi. I'm Nick Delte, from Californians  
14 for Justice, in San Jose.

15 And I agree with minimum wage getting higher  
16 because, you know, my mom has six kids, and it's hard for  
17 her. You know, she's a single parent and it's hard for her  
18 to make a living with us. And, you know, it's -- it's hard  
19 for her because, you know, she doesn't have any help from my  
20 dad, and she has six kids. Even though they're not living  
21 with us, you know, she still helps them out, even if it's  
22 her last dollar. She'll give it to the brothers and  
23 sisters.

24 And highering the minimum wage would help us, you  
25 know, with groceries and clothing. And right now I'm in  
26 high school, so I'm trying to graduate from high school, and

1 it's hard for me, you know, seeing other kids with nicer  
2 clothes, and I'm over here, you know, struggling. And I'm  
3 going to probably get a job right now at, you know, Baskin  
4 Robbins or something, just to help her out. But I think,  
5 you know, it should be higher, just for, you know, helping  
6 parents out, families that are on low budgets right now.  
7 You know, it's hard for her. She's like struggling with her  
8 last cent just to feed us. And it helps other families out  
9 too.

10 And I think, by raising it, it would take a big  
11 step for California and for justice.

12 Thank you.

13 (Applause)

14 COMMISSIONER DOMBROWSKI: Thank you.

15 MS. CUNEY: My name is Dee Cuney. I'm from Napa,  
16 California. I'm a private childcare provider, and I'm also  
17 an employer. And, of course, I do pay my overtime to my  
18 staff.

19 But you know what we're seeing in the childcare  
20 industry? We're seeing people get their hours cut to avoid  
21 paying overtime. Because, you know, we work ten to fourteen  
22 hours a day taking care of the working families' kids. But  
23 we're seeing an abuse of it, where people have had their  
24 hours cut, or they hire two people to work that day when the  
25 original -- before that, people would get their overtime.  
26 Now they're cutting staff hours in half.

1           But I think you need to be aware of what's  
2   happening.  Childcare workers don't make very good money  
3   anyway, but you need to know that that's happening out  
4   there.

5           Thank you.

6           (Applause)

7           COMMISSIONER DOMBROWSKI:  Thank you.

8           Do I have a motion to adjourn?

9           COMMISSIONER BROAD:  So moved, Mr. Chairman.

10          COMMISSIONER DOMBROWSKI:  Do I hear a second?

11          COMMISSIONER BOSCO:  Second.

12          COMMISSIONER DOMBROWSKI:  All in favor, say "aye."

13          (Chorus of "ayes")

14          COMMISSIONER DOMBROWSKI:  Thank you.

15                 Oh, I should say the next meeting of the IWC will  
16   take place April 14th, at a site to be determined in  
17   Oakland.

18          MR. BARON:  The federal building.

19          COMMISSIONER DOMBROWSKI:  Oh, the federal building  
20   in Oakland.

21          Thank you.

22                 (Thereupon, at 1:12 p.m., the public hearing  
23   was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

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I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California that I transcribed the three tapes recorded at the Public Hearing of the Industrial Welfare Commission, held on March 31, 2000, in Sacramento, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: April 6, 2000

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CYNTHIA M. JUDY

Reporter/Transcriber

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